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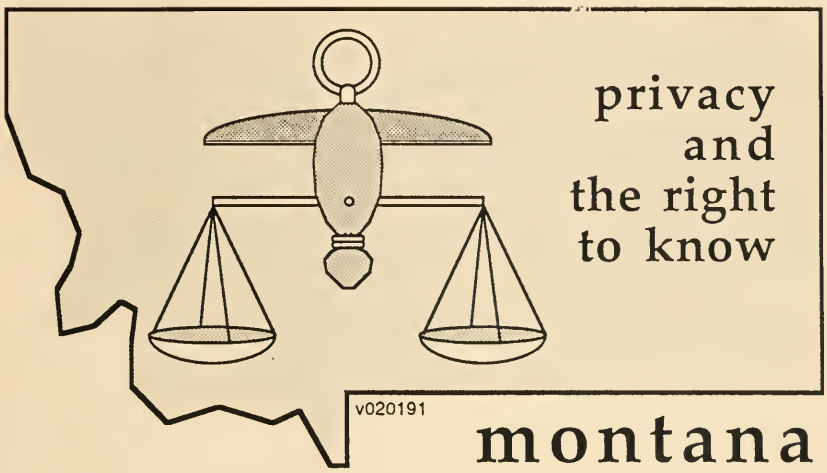

privacy and the right to know

montana cases and considerations

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Privacy and the Right to Know
· — Cases and Considerations — ·

In 1972, the citizens of Montana adopted a new Constitution, replacing the original Constitution implemented in 1889. Many commentators have described the 1972 document as one of the most progressive state constitutions in the nation. Of particular interest are two sections of Article II, the Declaration of Rights:

> *Article II, Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.*
>
> *Article II, Section 10. Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.*

The juxtaposition of these rights creates a tension that affects many aspects of government and the public. Another section of Article II also figures into this tension:

> *Article II, Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.*

Finally, a fourth section cited here affects some of the issues discussed in many cases that have framed the right of privacy in Montana. This is the search and seizure provision:

> *Article II, Section 11. Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall be issued without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.*

Obviously, the courts have been the logical forum for examining the inherent conflicts between the right of privacy and the right to know. This summary traces, in chronological order, the development of case law dealing with the right of privacy and the right to know. All but two of the cases come from the Montana Supreme Court; the other two are interesting District Court decisions that were not reviewed. The cases fall under several areas of law, and for ease of locating cases in a particular area of interest, they are flagged with single words after each case name:

issues of criminal offenses, law enforcement, and searches	... "criminal"
issues of openness of the courts and judicial proceedings	... "courts"
issues of lawsuits between citizens	... "civil"
issues of access to public documents and information	... "records"
issues of open meetings	... "meetings"

Within the executive branch, the Attorney General has issued several opinions addressing similar issues. Summaries of those opinions begin on page 26. The last few pages provide citations for the cases and opinions, and an index to their location here.

I owe a debt of research to the authors of the following comprehensive sources:

Brown, S. *Open Meetings and Individual Privacy.* Helena: Montana Law Institute, 1984.

Dobson, E. M. "Search by Private Persons: State v. Long." *47 Montana Law Review,* 189 (1986)

Elison, L.M. and NettikSimmon, D. "Right of Privacy." *48 Montana Law Review,* 3 (1987)

Decisions Prior to the 1972 Constitution

*State ex rel. Samlin v. District Court (1921) — **criminal***

This Prohibition-era case involved a search and seizure that took place under the provisions of Montana's Prohibition Act. It represents the Supreme Court's first interpretation of the search and seizure provision of the 1889 Constitution (fundamentally replicated in the 1972 Constitution). The case involved the security of private property, long recognized as a fundamental common-law right (as opposed to personal privacy, a related but more controversial issue). The chief of police in Miles City had seized several bottles of whiskey under a search warrant issued upon a "complaint" by a private citizen. Such a hearsay complaint appeared to satisfy the requirements of the Prohibition Act, but the Court found it did not satisfy the requirements of the Constitutional protection against unreasonable searches and seizures. Without solid facts constituting probable cause, the search warrant was invalid. The Court suppressed the evidence and ordered the whiskey returned to Samlin.

*State ex rel. King v. District Court (1924) — **criminal***

This case is similar to *Samlin* (above); a complaint filed by a private citizen under the Prohibition Act resulted in a search warrant. Here, however, the complaint itself seemed to stand the test of probable cause. The error was in the warrant. The complaint gave a legal description of property and referred to a "certain dwelling place ... now occupied by Bob King." The warrant was broader in its description of property. The Court noted, "If the warrant had contained the description given in the complaint we should sustain it, but the warrant did not contain that description; the essential words 'now occupied by Bob King' were omitted, and without them the description was far too general."

After reviewing the facts of the actual search and seizure under the warrant, the Court proclaimed, "Through this confusion there shines out the guiding principle that when it comes to search and seizure of the property of a citizen there must not be any obscurity or uncertainty." Following a review of federal decisions, the Court held that, in Montana as well, "[t]he warrant must designate the premises to be searched and contain a description so specific and accurate as to avoid any unnecessary or unauthorized invasion of the right of privacy."

Relying on *Samlin*, King also wanted his property back (copper stills, moonshine whiskey, and 500 pounds of sugar). However, the court noted that the law had changed since *Samlin;* liquor and related articles became contraband, and King had "no property right in the liquor nor in any of the other articles seized ... (save the sugar)." So, while the Court did suppress the evidence, it ordered the return of only the sugar.

*State ex rel. Holloran v. McGrath (1937) — **records***

The 1937 Legislature had passed a bill, and an attempt was afoot to place the law at referundum. To qualify the issue for an election, petitions had been circulated. Several had been delivered to county clerk and recorders. Joseph Holloran was a citizen who wanted to examine the petitions the determine if their form was proper and the signatures were valid. Addis McGrath, as the Silverbow County Clerk and Recorder, had denied Holloran access to the petitions. A recent opinion of the Attorney General backed up McGrath's position. Neither party disputed that once the petitions were certified and delivered to the Secretary of State, they were open to inspection. However, Holloran wanted to examine the signatures while they were in Butte and before the county, by law, burned the voting records that contained voter signatures.

After examining the arguments of the clerk and recorder, the Supreme Court stated, "The true question raised ... is whether the petitions ... in the hands of the county clerk and recorder are at that time and place subject to public inspection." The Court noted the assertion raised in oral argument that the whole issue was a political attack on the Attorney General, but said, "we are not interested in the motives [of Holloran] in demanding a right, if he is in law entitled to make that demand."

McGrath's argument turned on the assertion that the petitions were not public records until they were certified to the Secretary of State. The Court cited authority to refute this contention, but in the end, it was moot. "Even if these papers are not public records, we still have another section [of the law] which extends beyond the matter of 'public records' and eliminates the necessity of a precise definition of what constitute public records." Within the Public Records Act, the Court cited what is now 2-6-104, MCA: "... the public records *and other matters* in the office of any officer are at all times open to the inspection of any person." The phrase "and other matters" extends the right of inspection beyond only public records; thus, the Court ruled the petitions open to inspection.

Welsh v. Roehm (1952) — civil

This case resulted from a civil action taken by tenants against their landlord. The landlord had served an invalid notice for the tenants to vacate the house; when they did not leave, the landlord and his wife simply moved into the living room. "In that living room he and his wife stayed for 17 days and nights ..., unwanted guests of unwanted tenants." A jury awarded exemplary damages to the Welshes for "invasion of the right of privacy."

The landlord appealed the verdict, contending that "'invasion of their right of privacy' includes only unlicensed publication of names, pictures and other matters of a private nature." This contention prompted the Supreme Court to examine closely the issue of privacy, ultimately recognizing the common-law right of privacy in Montana: "That Pritchard [landlord] invaded the privacy and right of privacy of the Welshs is beyond question." The Court upheld damages, agreeing with the jury on "the gravity of a stranger invading and destroying the privacy and sacredness of the home ..."

State v. Brecht (1971) — criminal

In this murder case, the Supreme Court again examined the right of privacy under the search and seizure provision of the 1889 Constitution, as well as under the Fourth Amendment to the U.S. Constitution. Brecht was tried for the shotgun slaying of his wife. Trial court admitted the testimony of the victim's sister, who had listened on an extension to a phone conversation between Brecht and his wife; Brecht had said he had his shotgun and "would use it."

The Court reviewed *Samlin* and *King* (p. 2), reiterating that the search and seizure provision "protects persons and their rights to privacy and is not confined to trespass against property rights." The state contended that "the protection is afforded only against violations by law enforcement officers and not against violations by private citizens." The Court replied tersely, "We think not. The violation of the right of privacy ... is as detrimental ... in the one case as in the other." The Court used *Roehm* (above) to support and fortify the right of privacy in this criminal case. The disputed testimony was suppressed and a new trial directed.

Decisions Under the 1972 Constitution

State v. Coburn (1974) — criminal

In this case, the Court reexamined, clarified, and upheld the *Brecht* rationale, albeit in a three – two decision. Donald Coburn was an assistant manager at McDonald's in Helena. While he was at work, another assistant manager phoned the manager at home to tell him Coburn had some marijuana in his coat pocket at work. The manager conferred with Helena police, but wanted them to stay out of it to avoid adverse publicity; the police gave him no advice what to do. The manager went to the restaurant, entered the office, took the contraband from Coburn's coat, and turned it over to police. Relying on *Brecht*, District Court suppressed the evidence; the State appealed.

The State asked that *Brecht* be reversed, under application of the federal Fourth Amendment. The Court replied, "This would indicate that *Brecht*, as written, is not clear and an explanation is warranted." The bulk of the resulting opinion then sought to do so, stating in part, "*Brecht* rested only in part on the Fourth Amendment and it would appear that any attempt to reverse *Brecht* would necessarily require a treatment of additional constitutional considerations upon which the *Brecht* decision rests and, further, a consideration of the legal issues raised by defendant here." Coburn contended his rights had been violated under Article II, Section 10 (right of privacy), of the 1972 Montana Constitution, which had not been in place at the time of the *Brecht* decision.

The Court gave a nod toward Coburn's contention, saying that "the federal constitution contains no specific section establishing a separate and independent right of privacy as does the 1972 Montana Constitution." Beyond that statement, the Court did not address the issue. Rather, it turned to an extensive discussion of the exclusionary rule, noting that it "is a court adopted rule ... and has no roots in the constitution ... of the state or federal government." Nonetheless, it is necessary as the only means to secure constitutional rights, as no other remedies are available.

Finally, the Court said that, on legal grounds, Coburn's case differed from *Brecht*. When the manager conferred with police, "abundant probable cause" for an arrest existed. Furthermore, the conference defeated the idea that the manager was ignorant of the exclusionary rule, and the fact that he turned the drug over to the police established his motive to prosecute. It also brought up the question whether the manager was acting "in association or cooperation with the police." Citing a California case, the Court said the fact of the police "standing idly by" with knowledge of an improper search would suffice to war-

rant suppression of the evidence.

Justice Castles dissented: "I would squarely overrule *State v. Brecht.*" First off, he contended, "the plain and simple truth is that a seizure by a private individual does not violate the federal Constitution so long as that individual cannot be deemed an agent of the state because of his involvment with the police." Based on the record of the manager's conference with police, Castles said, "I would decline to hold that [the manager] was an instrumentality of the policy for the purposes of the instant search and seizure." With regard to the privacy and search-and-seizure clauses of the Montana Constitution, Castles wrote, "Even if the search and seizure ... was a violation of the ... provisions, the facts of this case do not warrant an application of the exclusionary rule." Finally, he said, "Even if ... [the manager] had been motivated to secure a conviction or had known of the exclusionary rule, the application of that rule in the case of a search and seizure by a private individual, as here, would not be appropriate."

*State v. Sawyer (1977) — **criminal***

Wade Sawyer was apprehended by an undersheriff in Townsend on charges of reckless driving and improper vehicle registration. He was accompanied in his vehicle to the sheriff's office to be ticketed. When he could not meet bond, he was booked and put in jail. Officers impounded his car and inventoried its contents, finding amphetemines in a bottle under the driver's seat. He was charged with criminal possession of dangerous drugs. District Court suppressed the evidence, saying the inventory search was unreasonable under the federal Fourth Amendment.

The Supreme Court noted that the officers had "no probable cause or even suspicion that contraband might be found," and no search warrant was sought. The inventory search was "solely ... a matter of standard police procedure ... " Examining the constitutionality of such a search was "a question of first impression in Montana."

The Court, citing Article II, Sections 10 (right of privacy) and 11 (search and seizure), said, "We need not consider the Fourth Amendment issue because we view the Montana Constitution to afford an individual greater protection ..." In this light, "an inventory search such as the one considered here is a significant invasion of personal privacy." That would not rule it out, the Court said, but it "must meet the 'reasonableness' and 'compelling state interest' standards of the Montana Constitution."

Considering the State's contention that the inventory was taken to protect officers from claims for lost property, the Court said, "Certainly this duty would be satisfied by simply securing and taking an inventory of any valuable items in plain view from outside the vehicle, rolling up the windows, locking the doors, and returning the keys to the owner." The Court thus adopted the standard that inventory searches "must be limited in scope to articles which are in plain from outside the vehicle." The suppression order was affirmed.

*State v. Brackman (1978) — **criminal***

Dale Brackman was charged with felony intimidation after threatening a person who owed him money. The conversation had been recorded by police, using a "wire" on the debtor. No warrant was obtained to use the wire. District Court suppressed the recorded conversations as violations of the Fourth Amendment (U.S. Constitution) and Article II, Section 10 (Montana Constitution, right of privacy). The result was the Supreme Court's debut interpretation of Article II, Section 10.

The Supreme Court examined federal case law and held that the Fourth Amendment did not protect Brackman from the warrantless recording, as long as the other party to the conversation had consented (as the debtor had). However, Montana's right of privacy was a different matter. In a three – two decision, the Court held that electronic monitoring without the knowledge of the person monitored is a violation of the right of privacy. The question then became whether a "compelling state interest" had existed that justified the infringement. The Court held that, without a warrant, the State had no grounds to show a compelling state interest. In this respect, the Court upheld suppression of the recorded conversation.

Dissenters Haswell and Harrison stated, "We do not believe that defendant had a reasonable expection of privacy during his conversation ... The entire conversation took place in [a] parking lot ... Anyone who was walking or driving by could have overheard defendant ..." "Art.II, Section 10 does not protect what a person exposes to the public." (See *State v. Brown,* p. 20.)

*State ex rel. Zander v. District Court (1979) — **criminal***

This case involved James Zander's marijuana-growing operation and the unusual circumstances under

which it was discovered. A neighbor had reported someone trying to break into Zander's trailer. A deputy responded and, when he found no one home and the door unlocked, entered to look for a possible burglar. In the process, he and a backup deputy found marijuana growing under lights in two closets. They left, obtained a warrant, and seized the contraband. Zander was charged with cultivation and sale of a dangerous drug.

Zander did not dispute the warrant, but contended the officers lacked probable cause to enter his home in the first place. The Court held that the entry was justified; the officers had reliable information a felony burglary had been committed. Their subsequent discovery of the marijuana was lawful under the "plain view" doctrine. Thus, Zander's search and seizure challenge failed.

Zander had an interesting second tack: he contended that, under the right of privacy, "there was no compelling state interest justifying the invasion of a private home to criminalize the growing of a marijuana plant by an adult." The Court refused to discuss the propriety of criminalizing marijuana, leaving that to the legislature. Nonetheless, contended Zander, no compelling state interest could justify intruding "into a private home to prevent an adult occupant from growing a marijuana plant ..."

The Court disposed of the argument: "The right of individual privacy must yield to a compelling state interest. Such [an] interest exists where the state enforces its criminal laws for the benefit and protection of other fundamental rights of its citizens. The compelling state interest in this case lies in the protection of a citizen's home ... from unlawful intrusion. [Zander]'s argument that the compelling state interest must be found in statutes prohibiting the cultivation and sale of marijuana is nonsense." The compelling state interest here, said the Court, was the protection of Zander's property against a reported burglar, therefore the invasion was justified.

Justice Shea later filed a lengthy concurring and dissenting opinion. He did not dispute the first entry of the officers, but disagreed there was any compelling state interest to reenter the home and seize the marijuana. He proposed that use of marijuana is essentially harmless, and the state has little or no interest in preventing its use. "In the present case," said Shea, "the State has not proved and, of course, the evidence does not justify the conclusion that there is a compelling State interest to invade the privacy of one's home to obtain evidence of possession and use of marijuana for personal, private use."

State v. Helfrich (1979) — criminal

Another marijuana case, this situation also involved the actions of a neighbor, only to a much greater degree. Richard Helfrich's neighbor in Willow Creek called the Gallatin County Sheriff to report Helfrich was growing marijuana in his backyard. A deputy investigated but did not see any. A few days later, the neighbor went into the garden and pinched some "leafy material," which she turned over to the sheriff; it tested positive as marijuana. Sheriff's deputies then photographed the garden from a public alley. On the basis of the evidence, they obtained a search warrant and subsequently arrested Helfrich.

District Court suppressed all the evidence and the State appealed. The Supreme Court recognized that the search warant stemmed from two facts establishing probable cause: (1) the photographs and (2) the sample obtained by the neighbor. Of the photos, the Court said, "It is virtually impossible by careful scrutiny of the photographs alone to either locate, or identify any substance which would give credibility to the existence of marijuana." This left only the sample, about which the Court said, "The sample obtained by [Helfrich's] curious neighbor was obtained by means of illegal trespass ... As a result, the sample was tainted as being the fruit of an illegal invasion of [Helfrich's] right of privacy."

The Court acknowledged a U.S. Supreme Court ruling that would admit the evidence "when obtained by a non-governmental agent who is not acting in concert with any governmental agency." However, under the right of privacy provision, the Court said, "We find the Montana Constitution affords an individual great, explicit protection in this instance than is offered in the Fourth Amendment ..." of the federal Constitution. After examining the transcripts of the Constitutional Convention, as well as the *Brecht* case (p. 3), the Court proclaimed, "We again affirm ... that the right of individual privacy explicitly guaranteed by the State Constitution is inviolate and the search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers."

Justice Harrison dissented. He said the exclusionary rule came about "to protect the individual from illegal police activity. It [does] not encompass illegal searches by private individuals."

Board of Trustees v. Board of County Commissioners (1980) — meetings

In this action, the Huntley Project school board sought to void a decision by the Yellowstone County Commission on the basis of an illegally conducted meeting. The issue involved a proposed subdivision. On

December 26, 1978, the commissioners held a public hearing. They announced they would make a decision "in a day or two." On December 28, the commissioners met in the morning and conditionally approved the subdivision. Although the minutes showed that all three commissioners were present, one of them was apparently unaware of the meeting or the vote. That afternoon, the final decision was made in a vote conducted by telephone. "Present" in the phone conversation were a deputy county attorney, a deputy clerk and recorder, one commissioner (all at the courthouse), and another commissioner (at a local motel). The third commissioner was at the same motel, but was unaware of the phone call or the vote.

The District Court declared the meeting improper but, in its discretion, did not void the decision. On appeal, the Supreme Court looked at the constitutional right the know, the Open Meetings Act, and statutes governing county commissions. The Court said yes, a meeting had taken place, and no, it was not an open meeting as required by law. Focusing on the issue of proper notice, the Court noted, "It is clear that this was not done here, even to the exclusion of one of the County Commissioners. ... Without public notice, an open meeting is open in theory only, not in practice."

The Court then took up the District Court's refusal to void the decision. "[T]he District Judge correctly determined that the procedure followed was improper. He went on to determine, however, that the decision involved an element of urgency. He also determined that the decision would not change simply because a public meeting was held. He, therefore, decided to look past the form to the substance and uphold the decision." The Supreme Court disagreed: "the disregard shown for the statutes ... placed a heavy ... burden on those who would prove the meeting legal. In the absence of such proof, we must hold there was a clear abuse of discretion on the part of the trial court. The failure here to follow proper statutory procedures of notice has the effect of invalidating the Commissioners' decision." The Court vacated the lower court judgement and sent the case back with instructions to nullify the subdivision decision.

*Great Falls Tribune v. District Court (1980) — **courts***

At the onset of the trial of Gene Austad in Great Falls, the District Court closed individual voir dire examinations of potential jurors. The judge ruled that substantial pretrial publicity of the crimes and the presence of the press would adversely affect the jury selection. The Tribune petitioned the Supreme Court to require the proceedings to be open.

The Supreme Court hinged its three – two decision on three factors. (1) "At the outset we observe the existence of a common law rule of open civil and criminal proceedings in the courts of this country." After examining a 1979 U.S. Supreme Court case *(Gannet v. DePasquale)*, the Court noted (2) "that the United States Supreme Court has ruled that the Federal Constitution does not require that a pretrial hearing ... be open to the public and that the press has no federal constitutional right of access to such a proceeding." The Court then looked at the right to know provision, concluding (3) "However, the situation is considerably different under the Constitution of this State."

In looking at the situation here, the Court allowed that "this right of access or right to know is not absolute. Our Montana Constitution provides an exception in cases where the demand of individual privacy clearly exceeds the merits of public disclosure. It also guarantees the defendant the right to a speedy public trial by an impartial jury. A balancing of these competing rights is required."

In examining the record, the Court said, "We find nothing in the news articles ... or in subjecting the prospective jurors to an open and public voir dire examination that would deny or impair defendant's right to a speedy public trial ..." The Court further opined, "Closing any part of the trial is simply the first step down that primrose path that leads to destruction of those societal values that open, public trials promote. Nothing short of strict and irreparable necessity to ensure defendant's right to a fair trial should suffice."

Justice Sheehy wrote at length for the dissenters with a thorough analysis of the *Gannet* case and its parallels to the Austad case. His conclusion was that "[t]he public's right to know ... must in this case, give away to the defendant's federal constitutional right to a fair trial." He cited the axiom that the state Constitution is subordinate to the federal Constitution, and that the power of the press is subordinate to the power of the government. "In all cases where the duty of the press to keep citizens informed collides with the duty of the court to ensure an accused a fair trial, the duty of the court must prevail."

*State v. Fogarty (1980) — **criminal***

This case arose from the revocation of William Fogarty's probation following a polygraph examination and a warrantless search of his home. Fogarty's original conditions of probation provided for unlimited searches and polygraphs by any law enforcement officer. Fogarty disputed those provisions. The Supreme

Court decided "that the unlimited polygraph condition is overly broad and thus invalid ..., and that the unlimited warrantless search warrant is an unconstitutional condition of probation."

The Court founded its three – two opinion on the search and seizure provisions of the federal and state constitutions and the state right of privacy. "We recognize that probationary status can and should carry with it a reduced expectation of privacy. But a probationer is living within society, not confined to a penal institution. ... A search of a probationer's home cannot avoid invading the privacy of those with whom he may be living ... Probationary status does not convert a probationer's family, relatives and friends into 'second class' citizens." Thus, the court required that a warrant based on probable cause be obtained before any search of a probationer's residence.

"On the other hand," the Court continued, "the privacy of third persons is not as intimately involved where a probationer's vehicle is searched or where the probationer is personally searched." The Court allowed warrantless searches in these situations, limiting them to a probation officer or police officer (at the direction of the probation officer). "The probation officer must, however, have some articulable reason for conducting either search. It is not sufficient that he make a decision to search based only on his unfettered discretion."

Justices Haswell and Harrison dissented, asserting that neither the warrantless search nor polygraph conditions were unconstitutional.

*State v. Hyem (1981) — **criminal***

Another search-and-seizure case, this one again involved the activities of private individuals (see *Brecht*, p. 3, and *Helfrich*, p. 5). Following a rash of ski thefts in Red Lodge, two victims and a friend began to suspect Dale Hyem. He was living with Cynthia Effinger, another defendant, in a rented house in Red Lodge; the house was for sale. Through a realtor they knew, one of the victims and the friend arranged to tour the house. (The pair had previously bought and remodeled old houses.) The defendants were not at home. During the "tour" they discovered the stolen skis under a bed and pulled them out to look at the serial numbers. They took this information to the sheriff, who then obtained a search warrant. District Court suppressed the evidence in the case.

The Supreme Court examined the case closely and produced a four - three decision. First, it said, the house tour was, in fact, a "search," and a warrantless one at that. And no warrant could have been issued, since there was no probable cause beyond the suspicions of the individuals; hence, the search was unreasonable. "Since the warrantless search here was *per se* unreasonable, it was unconstitutional under our federal and state constitutions."

"In addition," the Court continued, "the warrantless search violated the defendants'rights of privacy..." Although such infringement is allowable under a compelling state interest, the Court noted that the searchers "were acting in their individual capacities, and not for the state, [so] state action was not involved, and the searchers could never be in a position of showing a compelling state interest." Citing *Brecht* and *Helfrich*, the Court said, "Our constitutional prohibition against unreasonable invasion of privacy applies to all persons, whether acting for the state or privately."

A second issue in the case involved a possible waiver by the defendants of their right of privacy. Since the defendants were aware the rented house was for sale and being shown, the State contended, they couldn't have a reasonable expectation of privacy. However, said the Court, "[e]ven though the bedroom was accessible ..., by placing the skis under the bed ..., defendants sought to preserve the skis as private and, thus, be afforded constitutional protection. We find that such an expectation of privacy is reasonable."

Justice Morrison wrote the dissenting opinion. He didn't dispute the facts of the case; rather, he expressed disagreement with the rationale in all three cases — *Brecht*, *Helfrich*, and this one. "I would hold that the constitutional provisions [on privacy and search and seizure] ... contemplate state action only." Examining other cases, Morrison wrote, "Montana is one of only ten states to have an express provision for privacy in the state constitution. ... [N]one of these states have held the privacy protections to be applicable to acts of private persons." Among his conclusions, he stated, "By interpreting Montana's constitutional right of privacy as a prohibition against private, as well as state action, this Court has set itself foursquare against the position of the courts in all other states, and in my opinion, against the intention of the framers of Montana's constitution."

*Mountain States Telephone v. Dept. of Public Service Regulation (1981) — **records***

This action arose from a rate request submitted by Mountain Bell to the Public Service Commission (PSC). The Montana Consumer Council (MCC), a party to regulation representing the ratepayers, requested certain information from Mountain Bell. Mountain Bell agreed to turn over the information only if the PSC would grant a protective order to avoid divulgence of "trade secrets." The PSC denied the order, citing the right to know provision (Article II, Section 9) and asserting that Mountain Bell, as a corporation, could not have "individual privacy" referred to in Art. II, Sect. 9. The PSC also said that the Public Records Act and the PSC statutes required it to leave all records open to public inspection.

Mountain Bell then asked for a protective order from District Court, which upheld the PSC. The legal issues facing the Supreme Court were complex, extending beyond a simple application of the right to know provision. Essentially, the Court agreed partially with Mountain Bell in concluding that "trade secret information of the kind involved here is a species of property that is entitled to constitutional protection; ... we have further concluded that the provisions of our state constitution and statutes, when applied to deny the protective order in this case, have the effect of violating ... the Fourteenth Amendment of the federal constitution, and the due process clauses of the state and federal constitutions."

By labeling trade secrets as property, the Court recognized it was setting up a conflict beyond "individual privacy" and the "public right to know." In the end, the right of Mountain Bell to protect its property won out over the public's right to know, while still allowing the PSC to collect the information it needed to decide the rate increase request. It issued an interlocutory order directing District Court to provide the protective order Mountain Bell wanted, meaning the PSC had to close to inspection any files containing trade secret information.

The Supreme Court went a step further, though. It addressed the PSC's contention that Mountain Bell could not claim "individual privacy." It wanted to put "this possible corporate classification to rest ... by stating that the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure, and thus come within the exception of the right to know provision."

*Hastetter v. Behan (1982) — **civil***

Behan was the manager of a telephone cooperative in McCone County. Hastetter was a local physician and subscriber to the co-op. Hastetter felt the co-op was spending too much money and began to investigate its finances. This involved a number of calls to a regulatory agency in Washington, D.C. Behan examined Hastetter's toll records (phone bills) to determine where and to whom Hastetter was making his calls. Hastetter sued Behan for violation of his right of privacy under Article II, Section 10. District Court granted summary judgement to Behan.

The Supreme Court affirmed the summary judgement but took exception to the District Court's rationale: "The District Court held that the [Hastetter] had no claim of relief under [Art. II, Sect. 10] because no state action was involved in any way. While we agree that [Hastetter] has no claim ..., we do not agree with the District Court's reason. The key question is whether [Hastetter] had a reasonable expectation of privacy in his telephone records." After looking at federal precedents, the Court concluded that the Montana Constitution "protects only matters which can reasonably be considered private. Telephone company billing records are not private matters. The public awareness that such records are routinely maintained negates any constitutional expectation of privacy regarding the records."

Following his precedent in *Hyem* (p. 7), Justice Morrison specially concurred with a single sentence: "I agree with the result, however, I would affirm the trial court's determination that the privacy provision ... of the Montana Constitution is not offended by individual action as opposed to governmental action."

*State v. Carlson (1982) — **criminal***

This search and seizure case arose from a minor traffic accident involving the defendant, Brad Carlson. At the scene of the accident, for which Carlson was not at fault, he could not produce a driver's license, although he said he had one. That night, the police determined Carlson's license was revoked. The city made out two notices to appear, with the deadline being the next day; they were never mailed to Carlson. Five days later, the city judge issued an arrest warrant on failure to appear.

Two officers went to Carlson's home at 7:50 a.m. He appeared at the door "clad only in his underwear, and half asleep." When told he would be taken to the police station, he asked to get dressed. The officers said okay, but they would have to come inside if he were to do so. Carlson consented. Inside, the officers observed a small amount of marijuana and some drug paraphernalia. They took Carlson in, then obtained a search warrant and searched the house, finding other small quantities of drugs and a stolen

pistol. As a result, Carlson faced four felony charges in addition to the original two misdemeanors.

District Court concluded that the police had violated Carlson's federal Fourth Amendment rights and suppressed the evidence. In a 4-3 decision, the Supreme Court agreed with District Court's conclusion that (1) a full custodial arrest for two misdemeanors was unnecessary, and (2) Carlson's consent to the officers' entry into his home was, at least subtly, coerced. Although the District Court order and Supreme Court opinion relied on the federal Fourth Amendment and related precedent, the Supreme Court also made note of Article II, Section 10: "A compelling state interest is lacking here to overcome defendant's reasonable expectation of privacy in his home."

Chief Justice Haswell wrote for the minority: "The defendant was arrested under a valid warrant. Entry into his house was justified as an incident of that arrest to prevent escape or procuring a weapon. The marijuana and drug paraphernalia were observed in plain view ... This evidence was later seized under a valid search warrant. There was not unreasonable search and seizure or violation of defendant's right of privacy."

State v. Sayers (1982) — criminal

Kevin Sayers was renting an apartment in Hamilton. He gave notice to his landlords that he would be moving out. At that time, he gave oral permission for them to show the apartment; in addition, his written rental agreement reserved for the landlord "the right to enter ... at all reasonable times ... to show the unit to other prospective tenants ..." Later, Sayers borrowed the landlords' vacuum cleaner that was avaible for tenants' use. Two days later, the landlords were looking for it. Although Sayers wasn't home, the landlords entered the apartment. They saw the vacuum cleaner in the middle of the living room; they also noticed a bright light shining on the floor of a closet. Concerned about the danger of fire, they peered through the partially open door, seeing marijuana plants in the closet. They called a police officer, who examined the plants and then obtained a search warrant. District Court allowed the evidence and convicted Sayers; he appealed.

The Supreme Court affirmed District Court on three grounds. First, it held "that the landlords' entry was justified by the lease provision ..." Second, it held "that once the landlords ... entered the apartment, they had a right to peer in the closet ..." "An unexpected light coming from a closet would attract anyone's attention, particularly that of a landlord." Third, it held that "the application for a search warrant was legally sufficient." Not only were the landlords' own observations sufficient, "the landlords could, under the circumstances, permit the police officer to observe the items in the closet, and therefore ... the police officer's observations could be used as the basis to issue a search warrant."

Montana Human Right Division v. City of Billings (1982) — records

Four people had filed complaints with the Human Rights Commission (HRC) against the City of Billings. While investigating, the HRC submitted a supplemental interrogatory to the City, requesting relevant personnel records of the complainants and other specified employees and applicants. The City refused to hand over the records on any person other than the complainants, so the HRC issued a subpoena. The City responded that it would provide the records only under a court order, so the HRC took it to court. District Court came down on the side of the City, citing the non-complainants' rights of privacy under Article II, Section 10.

On appeal, the HRC argued that it needed the information to conduct a proper investigation. It also relied on *Hastetter* (p. 8), saying no privacy right exists where an employee or applicant voluntarily submits information to a third party. The Supreme Court disagreed: "In the present case, the personal information submitted to employers ... is quite different from the relatively innocuous telephone records in *Hastetter*. While we are aware that much of the information ... in employment files ... is harmless or is already a matter of general knowledge, we are not persuaded that the records are entirely free of damaging information which the individuals involved would not wish and in fact did not expect to be disclosed. The standard set forth in *Hastetter* is whether the party involved subjectively expected the information to be and remain private, and whether society is willing to recognize that expectation as reasonable."

The Court discussed the types of information that employees and applicants might give to employers. And even though an employer might provide no specific assurance of confidentiality, the Court said, "we believe that employees would reasonably expect such communication normally would be kept confidential. Therefore, we find that ... the information requested by the HRC is subject to the protection of Montana's constitutional right of privacy."

The HRC also had argued that only the affected individuals could claim a right of privacy; the City

had no standing to assert the right on behalf of its employees. The City's response focused on its liability: it could be sued by the individuals for divulging private information. The Court agreed that "potential economic injury is sufficient to establish standing."

Having established that the requested information falls under the privacy protection, the Court recognized that "the right of privacy is not absolute, and ... under certain circumstances, the State's interest in obtaining information about individuals may outweigh the individuals' right of privacy." Looking at the HRC's request, the Court said a compelling state interest existed; the HRC must have access to the records: "To deny the HRC access to the material it seeks renders ineffectual a substantial portion of its statutory investigative powers, and is a large step toward drawing the teeth of the HRC. That we are unwilling to do."

Finally, the Court said that once the information is turned over to the HRC, it still must be protected. The HRC had cited its own regulation on confidentiality, but the Court said, "We do not find this regulation to be an adequate protection of the right of privacy." Following the *Mountain States* decision (p. 8), the Court saw the need for a protective court order that would balance the competing rights. It directed District Court to issue an order requiring the City to provide the requested information. Further the order would require the HRC to protect the information, with two stipulations: (1) in the event of a hearing, the HRC would alter the information to conceal the identities of any non-complainants, and (2) in the event that the identity of any non-complainant had to be disclosed, the HRC could not do so without a further court order of "authorization and protection."

*State v. van Haele (1982) — **criminal***

The basis of this case follows from *Brecht* (p. 3),*Helfrich* (p. 5), and *Hyem* (p. 7). Thomas van Haele rented a storage unit at a complex in Billings. One day, as he was using his unit, one of the managers, knowing he was present, noticed the door was closed. Since she knew the unit contained no lighting inside, she wondered what he was doing. She knocked on the door and called out, but received no response. When she opened the door, she saw van Haele sitting inside, pointing a gun at her. The next day, on advice of the rental company's home office, the managers removed the hinge pins and cut the lock on van Haele's unit. Inside, they found a suitcase containing several bottles of pills. They notified police, who obtained a search warrant and seized the suitcase. Van Haele was convicted of criminal possession of dangerous drugs with intent to sell. He appealed, saying the evidence should have been suppressed.

The State urged the Supreme Court to overrule its previous holdings in the cases mentioned above. The Court responded, "We decline to overrule our previous citizen search cases and reaffirm our position taken therein." The Court cited the principle of judicial integrity, the foundation of the exclusionary rule. It further said that van Haele's right of privacy was violated, and restated its opposition to admitting evidence improperly obtained by private individuals: "To admit at a criminal trial evidence illegally obtained by private citizens is to encourage a vigilante movement which as no redeeming social value in our society today."

Justice Morrison concurred in the decision, but dissented along the lines of his dissent in *Hyem*. "Historically constitutions have been documents securing to private citizens certain fundamental rights against government intrusion. Constitutions should not regulate the conduct among the various private interests in our society." The proper forum for such concerns, he wrote, should be the legislature: "The right to be free from undue meddling by anyone should properly be the subject of legislative action. ... The constitution inhibits government, not private citizens." However, Morrison did modify his position from that in *Hyem*. "In my judgement, only the State can violate the constitutional right of privacy of an individual. Nevertheless, if a private individual violates the penal statutes ... and thus obtains evidence ..., the exclusionary rule should be applied the deny such tainted evidence admission."

Justice Harrison dissented with regard to including the actions of private citizens under the right of privacy protection. He noted, "I have disagreed with the views of the majority from their inception ..." Further, he proposed a modification of the exclusionary rule to the so-called "good faith" standard: "I would hold that evidence should not be suppressed under the exclusionary rule where it is discovered by officers or private persons in a course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."

*State ex rel. Smith v. District Court (1982) — **courts***

This case bears some similarity to the 1980 *Great Falls Tribune* case (p. 6). Daniel Smith was the defendant in a murder case, and he had moved to suppress certain items of evidence. At the time of the suppression hearing, the defense moved to close the hearing on the grounds that Smith's right to a fair

trial would be affected if there were public knowledge of the evidence he sought to suppress. The District Court denied the motion, but continued the ruling to allow Smith to get a Supreme Court ruling on the controversy.

The Court examined precedent and reached preliminary conclusions similar to those in the *Great Falls Tribune* case. However, that case had referred to "strict and irreparable necessity" to provide a fair trial as the standard for closing a hearing. Here, the Court declined to develop that standard further; instead, it adopted Standard 8-3.2 of the American Bar Association Standards for Criminal Justice "as the appropriate test to reconcile the competing interest of public access and trial fairness." Based on the ABA Standard, the Court held "that the public and press may be excluded from a pretrial suppression hearing only if dissemination of information acquired at the hearing would create a clear and present danger to the fairness of defendant's trial and no reasonable alternative means can be utilized to avoid the prejudicial effect of such information."

The first step by trial judges, the Court said, would be "to seek ... the voluntary cooperation of news media" in delaying the publication of information until a jury is impaneled. "If a suitable agreement cannot be reached, the trial court must then proceed to hearing," which would itself be closed. The Court provided guidelines for determining whether a "clear and present danger" exists. If so, "the court should then hear evidence and argument as to whether less restrictive alternatives would suffice to ensure a fair trial." The Court outlined some possible alternatives, then went on to say, "Only if the trial court finds that there is a 'clear and present danger' and that less restrictive alternatives ... cannot protect defendant's right to a fair trial, should closure be ordered."

If no closure were ordered, "the public and press should have immediate access to the transcript of the closed hearing on the closure motion. If closure is ordered, complete records of the closure hearing and the subsequent suppression hearing should be made and remain sealed until completion of the trial or an earlier time consistent with trial fairness."

Sonstelie v. Board of Trustees (1983) — meetings

Doris Sonstelie was a nontenured teacher at the Cayuse Prairie School in Flathead County. The school board consisted of three members, and the board meetings could "best be characterized as informal." At a regular school board meeting March 10, 1981, a long discussion of Sonstelie's teaching took place, along with a clear indication she might be fired. At the close of the meeting, the board members talked about calling a meeting March 14 to further discuss contracts. On March 12, the board chairman called the school clerk to tell her the meeting would be 9 a.m., March 14. Since there wasn't enough time to get notice of the meeting into the newspaper, the clerk called two radio stations and asked them to broadcast notice of the meeting. Neither station kept a copy or transcript of the notice.

The board met on March 14 and went into executive session (closed) to discuss contracts. On April 13, the chairman notified Sonstelie that the board would not renew her contract. Another regular board meeting was held the next day, and a public discussion focused on a request to reconsider the decision. The board voted again not to renew the contract. Sonstelie sued the board over the March 14 meeting, alleging it was held without adequate notice and was improperly closed. After a bench trial, District Court ruled against her, and she appealed.

The Supreme Court looked at the requirements in the law for giving notice, which read as follows:

> (1) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice ... (2-3-103, MCA)
>
> An agency shall be considered to have complied with the notice provisions of 2-3-103 if:
> ...
> (4) a newspaper of general circulation within the area to be affected by a decision of significant interest to the public has carried a news story or advertisement concerning the decision prior to a final decision to permit public comment on the matter. (2-3-104, MCA)
>
> (1) Any official of the state or any of its political subdivisions who is required by law to publish any notice required by law may supplement such publication by a radio or television broadcast of a summary of such notice or by both of such broadcasts when in his judgment the public interest will be served. (2-3-104, MCA)
>
> Each radio or television station broadcasting any summary of a legal notice shall for a period of 6 months subsequent to such broadcast retain at its office a copy or transcription of the text

of the summary as actually broadcast, which shall be available for public inspection. (2-3-106, MCA)

Given these requirements, the Court concluded, "These provisions do not mandate, as [Sonstelie] contends, that notice must be published for all public meetings and that proof of publication by broadcast and a copy of the broadcast be retained. Rather, these statutes establish a presumption that adequate notice was given where those events occur." The Court further said, "The Montana Open Meeting Act does not specifically mandate notice by publication. This Court will not formulate such a requirement."

Looking at the facts of the case, the Court held, "Ample evidence supports the conclusion ... that adequate notice was given and that the March 14 meeting was open." With regard to the executive session portion of that meeting, Sonstelie alleged it was illegally closed. "This contention is without merit," said the Court. The Open Meeting Act provides the following:

> Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. (2-3-203(2), MCA)

In District Court, the board chairman had testified that contract discussions often deal with matters "of a personal nature and privacy of the matters could really get touchy ..." Sonstelie contended the chairman had not made the proper determination of a matter of individual privacy, since the minutes of meeting contained no mention of it. (By law, the minutes must reflect "the substance of all matters proposed, discussed, or decided." 2-3-212 (2)(b),MCA) Sonstelie said that the chairman's testimony amounted to word-of-mouth evidence that contradicted the required written record. "These arguments fail," said the Court. "[Sonstelie] presented no evidence that such a determination was not made." Moreover, the word-of-mouth evidence was admissable, serving to clarify what occurred at the meeting. In conclusion, the Court said, Sonstelie "failed to prove her assertions."

Jarussi v. Board of Trustees (1983) — meetings

Here is another teacher-versus-school board dispute. Dale Jarussi was a nontenured, "exceptional" principal and teacher in St. Ignatius. In the middle of his second contract year, Jarussi met with the board and requested a raise. The board closed the meeting to discuss the request; Jarussi claimed he objected to the closure, but his objection didn't appear in the minutes. When the board returned to open session, it offered Jarussi a raise — less than requested — and set a deadline for acceptance.

Jarussi contacted a lawyer to proceed against the board for improperly closing the meeting. This apparently angered the board, which the chairman expressed to Jarussi. Jarussi claimed to have verbally accepted the board's offer by the deadline, although the board disputed this. However, the preliminary budget a week later included his position. The board met again March 29, 1978 — about two months after the initial meeting. A portion of the meeting was closed "again ... without a determination that the demand of individual privacy clearly exceeded the merits of public disclosure." Jarussi was not present. During the closed portion, the board decided to withdraw its previous offer.

Jarussi filed suit on three issues, one of which involved "retaliation ... for exercising his rights under Montana's Open Meeting Law." A jury trial returned a verdict in his favor, and the judge also determined that the board had violated the Open Meeting Law. On appeal, the board argued that its closure of the March 29 meeting was proper under the law. It cited the provision that "a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency." (2-3-203(4), MCA) The board relied on the collective bargaining exception, arguing that its discussions of Jarussi's salary constituted collective bargaining strategy.

The Supreme Court saw the necessity of determining "the correct meaning of the term 'collective bargaining.'" It examined definitions from a dictionary, a law dictionary, the National Labor Relations Act, and a federal appeals court decision; all of them referred to a process between an employer and a union or other representative of employees. "There is no specific definition of collective bargaining in Montana law," the Court said. "Therefore, we adopt the definition brought forth by the [federal appeals court]."

Given this definition, "the closing of the meeting to discuss Jarussi's employment status does not fall within the collective bargaining exception ... His actions were not on behalf of anyone else and the Board's decision would not affect anyone else. Hence, Jarussi had a right to be present during the Board's

deliberations regarding his future with the School District." The Court affirmed the District Court action that voided the Board's decision in the illegally closed meeting.

State v. Wood (1983) — criminal

Brian Wood was arrested at home and taken into custody on a felony bad check warrant. When he was searched during booking, officers found a gram of hashish, and a felony dangerous drug charge was added to his troubles. Wood moved for suppression of the evidence of hashish on the basis that the custodial arrest was an invasion of privacy. He relied on *Carlson* (p. 8), that the arrest was overly intrusive when other, less intrusive means were available to law enforcement. District Court granted his motion, and the state appealed.

The Supreme Court distinguished *Carlson* from Wood's case: the former was a misdemeanor traffic offense, the latter a felony charge. The Court said, "[T]he apprehension of felony suspects is a compelling state interest that justifies a full custodial arrest ..." Under that interpretation, the violation of Wood's privacy was justified, and the Court vacated District Court's suppression order.

Rickey v. City of Dillon (1983, district court) — meetings

After the City of Dillon fired its administrator in February, 1983, he filed a claim for severance pay or reinstatement. A newspaper article also reported that the ex-administrator was considering suing the city if it didn't meet his demands. Given this information, the City Council met with its attorney to discuss the situation. The Council closed the meeting, citing the provision of the Open Meeting Act that says "a meeting may be closed to discuss a strategy to be followed with respect to ... litigation when an open meeting would have a detrimental effect on the ... litigating position of the public agency." (2-3-203(4), MCA)

In the meeting, the city attorney advised the council that it was looking down the loaded barrel of a wrongful discharge suit or civil rights claim. The City subsequently settled all claims by paying the ex-administrator $4,500, and he never filed a lawsuit. This lawsuit was brought by a private citizen, who petitioned the court to declare the closed meeting illegal and to nullify any decisions made in it.

The District Court ruled that the City was not entitled to close the meeting using the litigation exception. Since no litigation was "pending or impending" at the time of the meeting, the court said, the City could not be discussing litigation strategy. Further, the court held that the litigation exception in the Open Meeting Act was unconstitutional, for the right to know provision allows meetings to be closed only when the right of privacy is involved.

The City appealed the decision to the Supreme Court in March, 1984. However, it later moved to dismiss the appeal, which the Court granted in June, 1984. Thus, the constitutional question was left to another day. (See *Associated Press, et al. v. Board of Education,* p. 25.)

Missoulian v. Board of Regents (1984) — meetings

In the Spring of 1980, the Board of Regents began implementing a newly adopted performance evaluation policy for University System presidents. The policy provided for two levels of evaluation: an annual review and a triennial "periodic" evaluation. The latter involved a self-evaluation by the affected president, as well as information-gathering interviews by the Commissioner of Higher Education with representatives of faculty, staff, students, administration, alumni, community leaders, and elected officials. The evaluation policy also guaranteed confidentiality, applying "to written documents and to discussions among all those who participate." It further specified that evaluations would be conducted in "executive session" of Board meetings.

The evaluations of two presidents were scheduled for May 3, 1980. The *Missoulian* requested access to each evaluation; it was denied. The reporter asked each president and the Commissioner if they would waive their privacy rights; each refused. The *Missoulian* brought action against the Board under the Open Meeting Act and Article II, Section 9 (right to know). After completion of discovery, both parties moved for summary judgement; District Court ruled in favor of the Board, sustaining the closure.

On appeal, the Supreme Court considered three issues: (1) whether the performance evaluations of the presidents were matters of individual privacy, (2) whether the privacy interest exceeded the right to know, and (3) whether there were alternatives to executive session that could still protect privacy. The Court used the two-part test developed in *Hastetter* (p. 8), and *Montana Human Rights Division* (p. 9). The first part asked "whether the person involved had a subjective or actual expectation of privacy ..."

Given the Board's policy and the statements of the presidents, the Court said, "It is undisputed that the six university presidents actually expected that the job performance evaluations would be private."

The second part of the test asked "whether society is willing to recognize that expectation as reasonable." Here, the Court said, "the determination should include consideration of *all* relevant circumstances, including the nature of the information sought." The Court relied heavily on its previous case, saying, "In fact, much of the discussion at the evaluation meetings involved matters ... listed in *Montana Human Rights Division* ... The discussion included family and health problems, employer's criticisms, employees' criticisms of the employer, interpersonal relationships, subjective viewpoints of the performance of the presidents and various subordinates, the ability of the presidents to work with the faculty, and other matters of a similarly sensitive nature."

The *Missoulia* contended that the discussions also involved matters of public policy or public record, but the Court said, "The record shows that matters of public interest were discussed only peripherally ..." Besides, said the Court, "nearly all private matters contain some component of innocuous information or general knowledge. However, that component does not transform private matter into public." The *Missoulian* further argued that the status of the presidents diminishes their privacy rights. The Court did not agree: "... mere status does not control the determination." "Indeed," said the Court, "the sensitive nature of the presidential function suggests that there is all the more reason to expect confidentiality ..."

In addition, "not only the presidents ... had privacy interests at stake in these evaluation sessions. Numerous administrative staff, faculty members and other university employees were discussed. The matters discussed with regard to these employees was of a sensitive nature and would reasonably be expected to remain confidential." The Court further noted that "many organizations, including the Missoulian, recognize the reasonableness and benefit of confidential personnel evaluations. Indeed, the Missoulian's editorial supported the confidentiality of the evaluations." Consequently, the Court held "that the university presidents' job performance evaluations were matters of individual privacy protected by Article II, Section 10 of the Montana Constitution."

On the second issue, the Court noted, "The constitution appears to prescribe two different standards for determining whether a privacy interest prevails over a competing interest." One of thise is a "compelling state interest"; the *Missoulian* argued that the right to know constitutes a compelling state interest. However, said the Court, "[t]he more specific closure standard of the constitutional and statutory provisions requires this Court to balance the competing constitutional interests ... to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know *may* outweigh the right of individual privacy, depending on the facts."

"The substantial value of confidential evaluations is apparent," said the Court, and "[t]he disadvantages of public disclosure are substantial." Despite its arguments, "the Missoulian has failed to show how any ... public interests would be furthered by public disclosure or hindered by confidentiality in this case." Thus, the Court held that the presidents' privacy interests clearly exceeded the merits of disclosure.

Finally, the Court discussed "whether alternative methods exist for protecting individual privacy in evaluation meetings." The Court discussed the pros and cons of three alternatives advanced by the *Missoulian*, discarding each one. "In short," concluded the Court, "closure appears the only practical and effective method of conducting job performance evaluations."

State v. Solis (1984) — ***criminal***

In this case, the Court refused to allow into evidence videotapes of the defendant that were made without his knowledge and without a search warrant. George Solis was arrested for allegedly "fencing" stolen property through a pawn shop set up in Great Falls as a "sting" operation; it was staffed by an undercover agent and equipped with videotaping machines. When the undercover agent would not return to Montana to testify, the prosecution tried to proceed on the basis of the videotapes and the testimony of the officers who ran them. District Court suppressed the evidence, and the State appealed.

The Supreme Court based its decision on Article II, Section 10 (right of privacy). Using its two-part test, it found that Solis "did exhibit an actual expectation of privacy": the taped conversations took place in a small room with only a friend and the "pawnbroker" (undercover agent) present. "Further, defendant's expectation of privacy was reasonable. There were no visible, separate areas from which other individuals may have overheard the conversations."

Nonetheless, continued the Court, the State may invade privacy with a showing of a compelling state

terest, and the apprehension of suspects constitutes such an interest. "However, even when the State has such a compelling interest, the invasion of an individual's privacy may usually occur only with cer-tain procedural safeguards. In this instance, those safeguards are the ones attached to our right to be free from unreasonable searches and seizures. The State was required to show probable cause to support the issuance of a warrant."

Justice Harrison dissented. "In these days where banks ... hotels and motels ... and many businesses ... try to protect their business from persons such as we are here involved with, video tapes run without anyone's privacy being invaded. I find it incredible under these circumstances that the effect of a carefully laid 'sting' operation to catch just such people is ruled inadmissable." He described what might form a good standard for the admissability of videotapes and concluded, "Viewing the entire operation presented by this case, I find the evidence of guilt so overwhelming that not to allow this evidence to go before a jury is tantamount to declaring the issue of guilt to be irrelevant."

State v. Sierra (1985) — criminal

Roberto Sierra, a Cuban who spoke no English, and a Mexican companion were apprehended on the streets of Livingston on suspicion of being illegal aliens. Although Sierra produced documents justifying his presence in the U.S., he was taken into custody. During a personal search at the station, officers found a small amount of marijuana in his pockets. They then ordered him to open his suitcase, where they found about seven pounds of marijuana. District Court allowed as evidence the marijuana found in Sierra's pocket, a misdemeanor amount, but suppressed the contents of the suitcase, a felony amount. The State appealed.

In a four – three decision, the Supreme Court held "that less intrusive means must be used under these circumstances, that they were not used here, and that in opening defendant's suitcase without a search warrant, the police violated his privacy rights." The holding for "less intrusive means" followed the rationale on inventory searches expressed in *Sawyer* (p. 4). The Court noted that the officers made no attempt to secure an interpreter and advise Sierra of his rights. Conceding that the officers found the small amount of marijuana on Sierra's person, the Court said, "Perhaps this would constitute probable cause to obtain a search warrant for the contents of [the] suitcase, perhaps not, but the fact is that the police did not even make an effort to obtain a search warrant."

Justice Weber wrote for the dissenting minority, basing his argument on the federal Constitution: "The United States Supreme Court has held that an inventory search after a valid arrest is a reasonable search which does not require a warrant."

State v. Long (1985) — criminal

This case produced a striking reversal from precedent set in *Brecht* (p. 3), *Helfrich* (p. 5), *Hyem* (p. 7), and *van Haele* (p. 10). First, the facts: Charles and Vicki Long were tenants of a house in Huntley. The owner lived next door. The rental agreement was oral; it provided that the landlord would pay electricity bills. When the bills suddenly went up, the landlord was concerned. He consistently noticed a light burning in the attic. On evening, in the absence of the tenants, he entered the house and went to the attic, where he discovered a grow light shining on 657 marijuana plants. He contacted the sheriff, who obtained a warrant, seized the plants, and arrested the Longs. District Court suppressed the evidence, and the State appealed.

Justice Morrison, the strident dissenter in the *Hyem* and *van Haele* opinions, wrote the five – two majority opinion. He noted, "This case presents four-square the issue previously addressed on several occasions, the application of the privacy clause and the exclusionary rule to private action." After discussing the previous cases, he wrote, "This Court now adopts the rationale of the dissenters ... and overrules all previous decisions of this Court inconsistent herewith."

As noted in previous dissents, the Court said, "No other state has followed Montana's lead in interpreting the privacy protections of a state constitution to be applicable to acts of private persons." Looking at Montana's privacy clause, in particular the phrase, "without the showing of a compelling state interest," the Court said, "The language of the section itself indicates that the framers contemplated state action by allowing an invasion where there was a compelling state interest." "Historically," continued the Court, "constitutions have been means for people to address their government. In rare instances, the constitutional language itself has specifically addressed private action [such as Article II, Section 4 on civil rights]. Notably, the privacy section does not address private individuals as does the civil rights provision ..."

With regard to the Longs' case, "Since we have held that the constitutional rights of the defendants

have not been violated, the reason for applying the exclusionary rule fades." Noting the Morrison dissent in *van Haele,* the Court allowed that "the exclusionary rule ... would prevent the State from relying upon the illegal conduct of a private citizen." Here, "the evidence was seized by a landlord who was determined by the District Court to be a trespasser. Under such circumstances, judicial integrity does not require exclusion of the evidence. We reserve for another day the determination of whether to apply the exclusionary rule to evidence gathered as the result of felonious conduct." (See *State v. Christensen,* p. 24.)

Justice Sheehy dissented. "Today's opinion has derailed the one vehicle that gave strength and vitality to the unique right of privacy enshrined in our State Constitution." In Sheehy's opinion, the majority ruling was not necessary: "In their zeal, the new majority rolled out a cannon to shoot a fly." He criticized the decision for three misconceptions.

First, the majority stated that previous decisions had held the exclusionary rule "rooted" in the constitution. Not so, said Sheehy: "It is a given that there is no textual support in our State Constitution for the exclusionary rule." It is *required,* not *mandated,* as the only practical answer to illegally gathered evidence. Sheehy stated that "any lawyer worth his salt must admit the exclusionary rule is the only effective remedy that will protect against unconstitutional intrusions on privacy by busybodies or snitches."

"A second misconception of the majority," said Sheehy, "is that the state constitutional right of individual privacy was intended by the framers to be a wall against state action only." In examining the previous decisions, as well as Constitutional Convention transcripts, Sheehy found support for his contention that the framers intended the clause to cover private as well as state action, despite the "compelling state interest" phrase: "Private persons do not act for the State. Intruders into privacy may be nothing more than nosy neighbors, busybodies, or snitches. The framers extended the right of privacy especially against these." With this decision, "Gone is that beautiful conception. ... This Court has stamped 'approved' on the nettlesome intruders ... It has said welcome to the 'Big Spy Country.'"

A third misconception, wrote Sheehy, "is embedded in [the majority's] irresolution about the nature and extent of our state Privacy Clause ..." The majority said, according to Sheehy, "that the Privacy Clause applies to private action if the private actors are criminals." Yet here, wrote Sheehy, "[t]he landlord stands before us as a trespasser. ... The majority offer no explanation why we must wait for another day for the determination of the effect of criminal activity on the Privacy Clause. This case presents criminal activity to the Court."

Justice Morrison took "the rather unusual step of replying to the dissent of Justice Sheehy in this case." "The dissent is an eloquent, if legally unsound, defense of privacy."

The brunt of Morrison's reply stated, "The majority opinion does not imply ... that there is a criminal exception to the privacy clause ... The dissent continues to confuse the privacy clause with the exclusionary rule. Criminal conduct, unless done with state complicity, does not violate privacy. However, the fruits of felonious conduct may be excluded as evidence, not because there is a constitutional violation, but because the trial court feels its exclusion necessary to preserve the integrity of the judicial system."

Further, said Morrison, "[t]he dissent's real plea emanates from a public policy concern. The public policy issue of whether the privacy clause *should* cover private action has not been treated in the majority opinion." Nevertheless, he expressed his own opinion: "There is, however, a real danger in extending privacy rights to the interaction of individuals." Along the lines of his dissent in *van Haele,* Morrison reiterated, "The rights and responsibilities that we as people have, one to the other, should be competed for in the legislative forum."

City of Helena v. Lamping (1986) — criminal

This appeal stemmed from a search conducted subsequent to an arrest. Leonard Lamping was arrested for an open container violation. He was taken to the county jail and, by standard procedure, all his personal property was taken from him to be inventoried. In his shirt pocket, he had a crumpled, open cigarette pack. The jailer looked in the pack and found a marijuana cigarette. The City convicted him of misdemeanor possession of dangerous drugs. He appealed to District Court and moved to suppress the evidence; the motion was denied, and District Court convicted him in a bench trial.

Lamping appealed the conviction, contending the search of the cigarette pack violated his rights under Article II, Sections 10 (right of privacy) and 11 (search and seizure). He based his argument on *Sierra* (p. 15). However, the court noted, that case involved a closed suitcase, while this case involved "an open,

somewhat crumpled cigarette package which was in the defendant's shirt pocket." The Court con-cluded that "Lamping was not subjected to an illegal search, nor was his right to privacy violated when the jailer looked inside the open pack of cigarettes to make sure it was empty."

Cox v. Lee Enterprises (1986) — records, courts

A client of Dale Cox, a Glendive attorney, filed a malpractice suit against him in Federal District Court, Washington state. Before Cox was served with the complaint, the Billings *Gazette* published an article citing the allegations against him. The lawsuit was subsequently moved to Federal District Court in Billings, which granted summary judgement to Cox. Cox then filed a defamation suit in Federal District Court against Lee, the *Gazette*'s parent company, and the *Gazette*. The publishers responded that their article was privileged under statute (27-1-804(4), MCA) that allows a fair and true report without malice of a judicial proceeding. Federal District Court certified the question to the Montana Supreme Court.

Noting that the term "judicial proceeding" is not defined in the MCA, the Court sought to construe legislative intent with regard to its meaning. It held "that the filing of a complaint was intended to be included within the phrase 'judicial proceeding.'" Further, the Court said, "The right to inspect pubic [sic] documents and be fully informed of their contents finds strong expression in our state constitution." (Article II, Section 9) "A complaint is a public document" under the Open Records Act (2-6-101, MCA). Under these determinations, the *Gazette* enjoyed the qualified privilege to publish its article.

The Court noted, though, "Our function is not to determine whether the Billings Gazette should respond in damages. That question will be decided by a jury in federal court. Fairness, truth and malice will be at the controversy's core. The qualified privilege exists only where the report was true, fair, and published without malice."

Justice Harrison dissented, noting the gravity of the malpractice charges against Cox and the fact that he was unaware of them, nor had the *Gazette* tried to check with him. He cited earlier cases from other jurisdictions supporting the conclusion that "public policy considerations and the promotion of important values requires that a privilege not be extended to the publication in question."

Justice Sheehy joined in the dissent, agreeing with Harrison. He further contended that the privilege in question "should be examined in light of the later adoption in the 1972 Montana Constitution of this provision: '... Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty.' Art. II, Section 7." This freedom is far more broad than the statutory privilege, said Sheehy, but the *Gazette* would have to answer to any abuse of that liberty.

Belth v. Bennett (1987) — records

This case represented a major collision between the right to know and the right of privacy, resulting in a four – two Supreme Court decision. Joseph Belth of Indiana was editor of a monthly publication, *Insurance Forum*. In March, 1985, he submitted a request to the State Auditor and Insurance Commissioner (Bennett) to be allowed access to certain reports. The reports in question are published regularly by the National Association of Insurance Commissioners (NAIC) through its Insurance Regulatory Information System (IRIS).

The IRIS reports provide two types of information: statistical calculations from data supplied by insurance companies and an analysis of those statistics. NAIC provides the reports, under cover of confidentiality, to help regulators determine whether a company doing business in their state requires investigation. Bennett refused to provide the reports to Belth, so he took the issue to court, relying on the right to know provision of the Montana Constitution.

Bennett based her defense on four assertions: (1) releasing the information would cause unwarranted injury to insurance companies; (2) the IRIS reports contained matters of individual privacy; (3) the IRIS reports contained investigative information, and (4) a specific statute, passed in 1959, authorized her to deny access:

> The commissioner may withhold from public inspection any examination or investigation report for so long as he deems such withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest. (33-1-412(5), MCA)

District Court granted summary judgement to Belth. Five findings underpinned the decision: (1) a corporation (such as the insurance companies) could not claim a right of privacy; (2) a public official (Bennett) could not assert the right of privacy on behalf of someone else; (3) the Constitution presumes that all documents are accessible, with limited exceptions; (4) the statute in question conflicted with

the right to know provision, and (5) the statute was unconstitutional. The court ordered Bennett to provide the IRIS reports to Belth. Bennett appealed.

On the first issue, the Supreme Court said, "We have already ruled on that question." Citing *Mountain States Telephone* (p. 8), the Court reaffirmed that a corporation may claim the right of privacy. On the second issue, the Court cited *Montana Human Rights Division* (p. 9), where it held that the City of Billings could assert the privacy right on behalf of its employees. In this case, it held "that the same rule allows [Bennett] to assert the privacy rights of insurance companies which are the subject of the IRIS information."

Next, the Court examined the statute in question. "We disagree," said the Court, "that the statute is unconstitutional on its face." The Court held that the statutory exception to release of reports was "identical to, and coextensive with, the right of privacy exception to the 'Right to Know.'" Given the Court's duty under precedent that "whenever there are differing possible interpretations of a statute, a constitutional interpretation is favored over one that is not," the Court said that "the statutory language is simply an alternative expression of the constitutional privacy exception."

"We also disagree," the Court continued, "... that the statute was unconstitutional as applied in this case." It faulted the District Court for not performing the balancing test between the merits of privacy and disclosure and undertook to do so itself. On the first part of the test, it found "that the insurance companies did have a subjective or actual expectation of privacy in the IRIS reports," given that NAIC stated the reports are confidential. Further, said the Court, "Given the NAIC assurance of confidentiality and the admitted possibility of inaccurate information [in the reports], we hold that the insurance companies' expectations of privacy are reasonable."

Undertaking, then, to balance the merits of privacy and disclosure, the Court determined "that the privacy interest at stake is a substantial one." It noted that several statutes require the Commissioner of Insurance to examine companies and make the reports available for inspection. "We agree that there would be some public benefit to disclosure [of the IRIS reports]. We do not find that that benefit would outweigh the demands of individual privacy. The benefits of disclosure are diminished by the availability of similar *final, relatively non-subjective* examinations made by the State." (emphasis in original) "Thus," concluded the decision, "[Bennett] may properly deny ... Belth access to the IRIS reports."

Justice Sheehy filed a lengthy dissent, joined by Justice Hunt. "If the 'right to know' ... means anything," wrote Sheehy, "it means that this specific information should be available to Montana insureds and to any organization ... that would funnel such information to Montana insureds."

First off, he contended, "the basic information used by IRIS is public information." Noting that IRIS draws its information from "ratios" and "annual statements" that are open to the public, Sheehy said, "It is nonsense to hold that there is an expectation of privacy in the results so derived from public information. It approaches inanity to hold that Montana insureds shall not be allowed to know which troubled companies are doing business in Montana or that they are troubled companies."

Sheehy argued that the determination in this case could not be based on the right to know provision alone; it must also consider Article II, Sections 8 (right to participate) and 10 (right of privacy). In examining the majority's balancing test, Sheehy contended that insurance companies are involved in the financial affairs of the public. "It should be clear," he wrote, "because the insurers are so affected with a public interest, ... there is a compelling state interest which overrides any right of individual privacy." And since the IRIS reports provide information that may lead the Commissioner of Insurance to investigate a company, "Section 8 obviously intends that governmental agencies open up such information *prior to the final decision* of the regulators." (emphasis in original)

Lone Bear v. Tobin (1987, district court) — records

This case raised questions about who may have access to documents that are confidential under statute. Laura Lone Bear was stopped while driving in Billings, and her three children were taken into custody by law enforcement officers and welfare workers from the county and Department of Social and Rehabilitation Services (SRS). The children ended up out of state with their father. Lone Bear retained an attorney to try to get her children back.

Trying to determine if SRS had acted negligently, Lone Bear made two requests to review the case records on her and her children. She agreed to let SRS excise the identity of confidential informants, but the department refused to let her see the records; it cited a provision of the child abuse statutes that says "case

records ... shall be kept confidential ... The court may permit public disclosure ..." (41-3-205 (1)(2), MCA) SRS maintained that the file contained information on other persons, whose privacy rights outweighed Lone Bear's right to know; it said she had to obtain a court order to see the file. Instead, she filed an action for a declatory judgement to see the files without a court order, asserting her right to know under Article II, Section 9.

District Court held that the statute, "as applied here, is unconstitutionally restrictive, and that [Lone Bear's] right to know exceeds the right to individual privacy asserted by the Department." The court reached its decision by examining several precedents and applying them to the case at hand. The first step in doing so was to determine the relevant expectations of privacy. Here the court held "that the *subjects* of those files would expect them to remain confidential.. As for the informants, we find that they may expect their *identity* to remain confidential ... However, if they expect any action to be taken on the basis of the *information* they provide, the can hardly expect the content of their communications to remain secret." Thus, the court held that informants would not have an expectation that the information would remain confidential — and if they did, it would be unreasonable.

Given that the subjects of a file have an expectation of privacy, is it reasonable? Here, the court said, the issue does not concern release of information to "the general public," rather, "[t]he issue is the reasonableness of that expectation as to a fellow subject of the file." The court noted that Lone Bear was seeking information that SRS had about *her*, not others, and that the information could affect her family, her reputation, even her liberty. "To allow such intrusions into the private affairs and liberty interests of a person while denying that person access to the content of the information that provided the basis for the intrusion would shock the conscience of a free society. It seems that this case presents a striking example of the ultimate reason for having a constitutional right to know."

Thus, concluded the court, "A file subject's right to know should always prevail over the privacy interests of a nonsubject. ... When a fellow subject comes forward asserting that their right of individual privacy exceeds the merits of disclosure, that person should bear the burden of proof. ... The determination of whose constitutional rights control in such situations should be made in the most simple, inexpensive, expedient method available."

The court outlined a proposed method for making such a determination: (1) the agency holding the documents would notify a file subject of a pending invasion of privacy; (2) if the notified person objected to release of the information, an independent agency (such as the Department of Justice or a county attorney) would hold a hearing to determine whose right prevailed; (3) either party, if dissatisfied with the determination, could petition the courts for judicial review. (One final note — the statute in question here has since been amended to allow access by "a parent or guardian of this child who is the subject of the report ... without disclosure of the identity of any person who reported or provided information ...")

State v. Holzapfel (1988) — criminal

This unusual search-and-seizure case involved the sale of cocaine, and undercover officer, a middleman turned state's evidence, and "invisible flourescent detection powder." In one of the arranged buys, Billings police dusted their money with the powder, which shows up only under ultraviolet light. They gave it to the middleman, who then allegedly bought cocaine from the defendant, David Holzapfel.

When Holzapfel was booked, a special agent retrieved Holzapfel's wallet from the jailer and examined it under an ultraviolet light. He found traces of the powder. He then shone the light on Holzapfel's hands and found traces of the powder on one finger. No warrant had been issued for either of these examinations. At trial, Holzapfel moved to suppress the evidence from the "searches"; District Court denied the motion, and he was convicted. He appealed.

The Supreme Court cited federal precedent that "the search of the wallet ... was valid under the Fourth Amendment." Neither did the search did violate Holzapfel's privacy rights under Article II, section 10. The Court first cited *Lamping* (p. 16) and adopted a federal court's conclusion that "a wallet is a possession immediately associated with the person which may be searched pursuant to a search of the person following a valid arrest." Thus, the evidence of detection powder on the wallet was admissable.

With regard to the ultraviolet examination of Holzapfel's hands, the Court acknowledged that the practice, without a warrant, was legally controversial. The Court termed the problem a "question of whether exposing an arrestee's hand to an ultraviolet light constitutes a search under the plain view doctrine. If the exposure does not constitute a search, Holzapfel does not have a legitimate expectation of privacy in what may be revealed by shining such a light on his hands."

The Court cited a Pennsylvania decision that "defendants had no reasonable expectation of privacy as to the presence of foreign matter on their hands ..." What is found "may be compared to a physical characteristic, such as a fingerprint or one's voice, which 'is constantly exposed to the public.'" The Court agreed with this reasoning and held "that under the facts of this case, the shining of the ultraviolet lights does not constitute a search so as to implicate privacy rights under the ... Montana Constitution."

Justices Hunt and Sheehy dissented in this three – two decision. First, Hunt recalled *Sawyer*, which had held that "an inventory search is a substantial infringement on individual privacy and therefore it is subject to the right of privacy provision, as well as the search and seizure provision of the Montana Constitution." Hunt conceded that checking the contents of the wallet during inventory was permissible and that the wallet could be admitted as evidence. However, he noted the special circumstances under which the special agent retrieved and examined the wallet. "It is intellectually dishonest to call such a procedure a lawful 'search incident to arrest.'" Hunt continued, "[T]he record is void of any reason why a search warrant could not be obtained ..." Since "[s]earching with an ultraviolet light is not a usual, standardized procedure," the minority would have suppressed the evidence.

*State v. Brown (1988) — **criminal***

With this decision, the Montana Supreme Court overruled *State v. Brackman* (p. 4), in which they had held that the warrantless recording of a face-to-face conversation without the defendant's knowledge violated the right of privacy.

This case involved the sale of "a large amount of marijuana." An informant had contacted the Bozeman police, and its officers worked with the informant to set up the sale to an undercover officer. As the principal seller had to begin serving a sentence in the county jail as arrangements were taking place, he delegated the transaction to his girlfriend, Katherine Brown. As the sale was set up, the undercover officer monitored and recorded three telephone and two face-to-face conversations with Brown; no search warrant was obtained to record the conversations. Brown was subsequently convicted.

On appeal, the Supreme Court considered both types of recorded conversations. With regard to the telephone conversations, the Court reaffirmed previous decisions (none referenced in this summary) which had held that "if one party to a telephone conversation freely consents, the conversation can be electronically monitored and recorded without a warrant, and the evidence is admissible ..."

With regard to the other conversations, the Court stated, "We now hold that warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire ... does not violate the right to be free of unreasonable searches and seizures nor the privacy section of the Montana Constitution. The consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. Evidence obtained by such monitoring is admissible ... As in the case of telephone recordings, the consenting party may be an informant or a police officer. To this extent, the *Brackman* case is specifically overruled."

The reasoning behind the decision focused on the determination that "[t]here must be some violation of a reasonable expectation of privacy before the provision applies. ... We conclude that a defendant has no reasonably justifiable expectation that statements made to another will be kept private by that person." Further, the Court considered what "object" was seized and who "possessed" it: "The 'object' to be seized in this case is the conversation between the defendant and the undercover officer. It is logically difficult to strictly characterize the defendant's possessory interest in her conversation with the officer. We conclude that both participants had an equal interest in the conversation and that either could consent to the monitoring."

Justice Hunt dissented: "I believe if the average citizen was asked whether the Montana Constitution gave him the right to expect his conversations with other people to be kept private, the answer would be a resounding 'yes!'" Hunt would find that a reasonable expectation of privacy existed. In addition, Hunt wrote, "I agree with the majority's statement that it is logically difficult to characterize a conversation as something in which the defendant has a possessory interest. However, I disagree ... that the officer and the defendant had 'equal' interests in the conversation." The officer's interest, said Hunt, was to gather incriminating evidence, using the whole law enforcement "arsenal." "The provisions of the state constitution were designed to protect citizens from abuse and misuse of this arsenal. To state that the defendant has an equal interest is to state that she has no interest and consequently no protection from governmental intrusion."

Hunt continued, "Although the majority seems to have harmonized Montana law in this area with the federal trend, it does a disservice to the citizens of this state by ignoring the greater right ... recognized

by Art. II, sec. 10 ..." And this, said Hunt, "is not a case in which there was no time to obtain a warrant. Even if getting a warrant in these types of cases becomes a perfunctory exercise, it should be done so as to at least acknowledge the rights of the individual ..." Hunt concluded, "The decision made today is indeed a sad one for the citizens of the state of Montana. The majority may have unwittingly opened the doors for the erosion of any protection the privacy clause gives individuals of this state."

*Collins v. State, Department of Justice, and Lindell (1988) — **civil, criminal***

This appeal was the outcome of a civil lawsuit filed by Donald Collins against Clyde Lindell, a Highway Patrol officer. Collins had sued Lindell for assault and battery, as well as violation of his constitutional rights. The State and Department intervened on Lindell's behalf.

The dispute began when Lindell, on duty, stopped Collins on the highway near Pablo. Collins had been driving erratically, and he failed a field sobriety test. Lindell took him in to the sheriff's office in Polson. Collins refused a breath test. Lindell learned he was on probation for a previous DUI. After consulting with the County Attorney and Justice of the Peace, Lindell took Collins to the hospital for a blood test, authorized by a search warrant from the JP. This lawsuit arose, and District Court granted summary judgement to Collins.

Collins contended that the blood test violated his right to privacy. He cited a U.S. Supreme Court case, in which that Court recognized "that the taking of blood samples by law enforcement officials without consent would, in limited circumstances, be prohibited by the personal privacy guarantees of the Fourth Amendment ..." The Montana Supreme Court concluded that case "does not support Collins privacy argument because the blood sample in this case was justified in the circumstances and was taken in the proper manner."

Although neither party significantly argued the privacy issue on appeal, the Court addressed it for its "public policy impact." The compelling state interest here, said the Court, "is Montana's enforcement of its criminal laws, other than DUI in this case ..." Collins was in violation of probation. Had this been solely a DUI case, the Court said, "the blood test ... would not have been authorized without Collins' consent... In this instance of a non-DUI offense, an involuntary blood test supported by a search warrant issued with sufficient probable cause ... is not a violation of a person's right to privacy under the Montana Constitution. However, law enforcement officials should be cautioned that, given the proper circumstances, we will not hesitate to hold that a blood test taken without probable cause or exigent circumstances is unreasonable and an invasion of a person's right to individual privacy."

*Engrav v. Cragun (1989) — **records***

Barry Engrav was a University of Montana student from Granite County. He was conducting research for a report on law enforcement in the county and submitted a request to the sheriff for "records of the daily log of phone calls, case files of criminal investigations, pre-employment investigations, and lists of arrested persons." The defendant here was the sheriff, who denied access to the records. Engrav took him to court, and District Court sided with the sheriff, "finding that the right of privacy of those people on the requested lists and investigation reports held a right of privacy that outweighed the public right to know."

Engrav's appeal focused on Article II, Section 9 (the right to know), but he also relied on the Public Records Act (2-6-102, MCA). The sheriff relied on the Criminal Justice Information Act (44-5-101, *et seq.*, MCA), which stipulates that many of the requested records should remain confidential. The Supreme Court began its consideration by stating, "[I]t is important to remember that in all the relevant laws the right of privacy for the individual is expressly regarded." The Court then applied its two-part test to the various records Engrav wanted; it reached a consistent conclusion that the persons involved had actual expectations of privacy regarding the information in the records and that their expectations were reasonable.

Once the privacy rights were thus established, the Court implicitly turned to Article II, Section 10 (right of privacy). "Before this Court will invade the personal privacy of the persons involved, a compelling state interest to do so must be found. There is no compelling state interest here which allows the dissemination of the requestion information. [Engrav] wishes to do a study for a school research project; this is not a sufficient state interest."

*Great Falls Tribune v. Cascade County Sheriff and City of Great Falls (1989) — **records***

Following the arrest of a suspect in November, 1988, a jailer noticed injuries to the suspect's head and face.

A subsequent investigation lead to disciplinary action against one deputy sheriff (suspension) and three police officers (one was fired; the other two resigned as an alternative to dismissal). A *Tribune* reporter saw a report which contained the names of several officers without specifying their involvement. When he tried to find out the names of the officers who had been disciplined, the county and city refused to reveal the information, citing the officers' right of privacy. The *Tribune* filed suit to compel disclosure, and District Court issued an order for the city to do so. (By this time, the sheriff's office had identified the deputy and had been dismissed from the suit.)

On appeal, the Supreme Court invoked its two-part balancing test and reviewed several cases (*Montana Human Rights Division*, p. 9, *Missoulian*, p. 13, *Belth*, p. 17, and *Engrav*, p. 21). Turning to this case, the Court affirmed the District Court order: "The law enforcement officer in this case may have had a subjective or actual expectation of privacy relating to the disciplinary proceedings against them. However, law enforcement officers occupy positions of great public trust. Whatever privacy interest the officers have ... is not one which society recognizes as a strong right.

"On the other hand," the Court continued, "the public has a right to know when law enforcement officers act in such a manner as to be subject to disciplinary action. ... We conclude that the public's right to know in this situation represents a compelling state interest." Based on this analysis, the Court stated, "The privacy interest of the officers does not clearly exceed the public's right to know. We note that we are not ruling that the entirety of any personnel files must be revealed[,] ... only the release of the names of the officer who was terminated and those who resigned."

State, ex rel. Great Falls Tribune v. Eight Judicial District (1989) — courts

A reporter for the *Tribune* entered a District Court in Great Falls while a hearing for revocation of parole was underway. Before her entrance, the judge had closed the hearing. When the reporter was told it was closed, she left. She then called her editor, who told her to go back and find out why it was closed and to ask for a continuance while the paper contacted its attorney. She returned, accompanied by a TV reporter; they both left under threat of expulsion. The *Tribune* filed an action to determine the grounds for the closure and whether it was proper. The District Court separately cited the reporter for contempt, and fined her $300. This review consolidated both cases.

First, the Court determined on precedent that a probation revocation hearing is not a trial, so the right of the defendant to a fair trial was not an issue (see *Tribune*, 1980, p. 6). However, the State argued that the probationer's right of privacy exceed the merits of public disclosure in this case. This argument was based on protecting the probationer "from harm which might otherwise occur if the revocation were made public." Since the hearing transcript remained sealed, the specifics of possible harm were not revealed.

The *Tribune* cited *State, ex rel. Smith* (p. 10) in arguing that, before closure, the court should have provided notice of the intent to close, conducted an evidentiary hearing, and then decided whether to close on the basis of a "clear and present danger." The Court agreed that "if closure of a portion of a judicial proceeding is necessary, the procedure imposing the least restriction on the public right to know should be followed." In this case, though, the Court concluded, "Any leaking out of the information would endanger the physical safety of a person involved. There were no reasonable alternatives that the District Court could follow here. For that reason, we hesitate to adopt the ... rule that notice must be given of all potential closure decisions, and would rather allow the district courts to proceed on an *ad hoc* basis to make the decision in accordance with the facts and circumstances ... at the time." The Court thus refused to reverse the closure order.

On the contempt issue, the Court noted that the reporter's re-entrance "interrupted the judicial proceeding." This was not necessary; "Other options were open to [the reporter] and the Great Falls Tribune when first she learned of the closure and left the courtroom." In upholding the contempt order, the Court stated, "We affirm the right of the public and the press to learn from the District Court the reasons for closure when the demands of individual privacy clearly exceed the merits of public disclosure. That right, however, is not so broad as to include interruption of the closed proceeding itself, especially when interruption at a critical time might void the reason for the closure."

In re, etc. Allstate Insurance Co. v. City of Billings (1989) — records

This case arose from an application by Allstate to the Billings police to obtain investigation records regarding the death of a person Allstate had insured. In applying for life insurance, the person had told Allstate he didn't use drugs and had no prior treatment for AIDS. Nine months later, he died at a Billings motel. Investigation revealed syringes and drugs, and the coroner reported that the deceased was a frequent drug user and tested positive for HIV. The coroner ruled the death accidental.

Allstate wanted to investigate further, suspecting that the cause of death was suicide. The company asked for access to investigation reports. Conceding to the city's interpretation of the Criminal Justice Information Act (CJIA), Allstate petitioned District Court for release of the records. The company and the city agreed (1) against a general release of the records, (2) that District Court could secretly review the records and decide what could be released to Allstate, and (3) the court would issue a protective order directing Allstate to keep the information confidential. However, District Court determined that Allstate was not authorized by the CJIA to receive the information and denied access. Allstate appealed.

The Supreme Court acknowledged the ongoing tension between the right of privacy and the right to know: "An easy solution which would provide concrete and uniform guidance in the balancing of these two guarantees has evaded both the courts and the legislature." The Court noted the legislature's attempt to balance the rights in the CJIA: "dissemination of confidential criminal justice information is restricted to criminal justice agencies or to those authorized by law to receive it." (44-5-303, MCA) Because Allstate could not point to any statute authorizing it to receive the records, District Court had ruled they could not obtain them.

In light of the Constitution, the Court didn't like this interpretation. "The trial court's opinion ... effectively delegates to the legislature the authority to place binding construction upon the State Constitution. However, its provisions control the legislature, not vice versa. While the legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." In this case, the Court noted, "The trial court held that in order to be 'authorized by law,' one must be specifically authorized by statute. We find that this reading ... is too narrow."

The misunderstanding turned on the use of the word "law": "the word 'law' includes constitutional as well as statutory law. Accordingly, one is 'authorized by law' to receive criminal justice information by the Right to Know provision of the Constitution. The only limitation on the right to receive this information is the constitutional right to privacy." Given that the judiciary must interpret the Constitution, the Court said that "it is the courts' duty to balance the competing rights to determine what, if any information, should be given to the party requesting information from the government. In view of the policies behind the [CJIA], it is incumbent on any party to make a proper showing in order to be eligible to receive such specific confidential information. It appears Allstate has met this initial burden."

The Court remanded the case, with instructions that District Court review the records and decide what to release. "In making this examination, the court shall take into account and shall balance the competing interests of those involved." Further, said the Court, "Allstate should be accorded the widest breadth of information possible. However, its request should be reviewed with deference towards the privacy rights of those named in the police records."

Flesh v. Board of Trustees (1990) — meetings

Robert Flesh brought suit against the school board of the joint district, Mineral and Missoula Counties; he contested the closure of four board meetings. For three of the meetings, he sought a declatory ruling that they were improperly closed. For the fourth meeting, he sought an order voiding any decision resulting from the closed meeting.

The fourth meeting in question took place August 19, 1987. At that meeting, Flesh pressed a grievance against Carl Dehne, an assistant administrator with the school district. Flesh alleged Dehne "had maliciously made false statements for the purpose of injuring Flesh's reputation in the community." The disputed statements were made in a newsletter article, authored by Dehne, about comments Flesh had made while candidate for the school board. The grievance sought a public and written apology, as well as disciplinary action against Dehne. Flesh also requested an open hearing.

At the hearing, the chairwoman asked Dehne if he wanted to waive his right of privacy; he declined. Flesh then tried to amend the grievance to delete his demand for disciplinary action, but the chairwoman denied the request. The board closed the meeting over Flesh's objections; at the hearing, besides the board, was Flesh, Dehne, Dehne's attorney, and the superintendent. After hearing the grievance, the board excluded everyone but the superintendent while it deliberated. The board took no action against Dehne.

District Court first granted summary judgement for the board on all meetings except the August 19 meeting. The court held that Flesh had filed his complaint beyond the 30-day timeline in the Open Meeting Act. ("A suit to void any such decision must be commenced within 30 days of the decision." 2-3-313, MCA) The court also found that Flesh lacked standing to bring an action regarding those meetings, as "he had no personal interest in those meetings beyond the common interest of all citizens and taxpayers." Furthermore, said the court, the issue lacked any "justiciable controversy." On the issue of the grievance meeting,

District Court held a bench trial and ruled in favor of the school board. Flesh appealed.

The Supreme Court looked first at the summary judgement. It held that the District Court had improperly read the law; Flesh did not seek to void these meetings, so the 30-day timeline did not apply. However, the Court upheld summary judgement: "The District Court was correct in holding that Flesh's claim must fail both for lack of justiciable controversy and lack of standing."

The Supreme Court also affirmed District Court's verdict on the August 19 meeting. "The presiding officer determined the grievance meeting ... might involve a review of Dehne's employment record." Relying on *Montana Human Rights Division* (p. 9), the "Court has previously held employment records are subject to the ... right to privacy." The Court then applied its two-part test. It declared the first part was met: "Dehne clearly had an expectation that when his employer, the School Board, considered the complaint against him it would do so in a closed session." Relying on *Missoulian* (p. 13) the Court said the second part of the test was also met, "because society is willing to recognize a privacy interest in a public employer's consideration of allegations involving an employee's character, integrity, honesty, and personality."

Flesh argued that Dehne's privacy rights did not apply to his authorship of the newsletter article at issue. The Court agreed: "Dehne has no privacy interst in the newsletter." "However," said the Court, "Flesh's grievance complaint not only called for a review of the newsletter, but also a request for disciplinary action against Dehne. This request ... would necessitate a review of Dehne's personnel record. Clearly Dehne has the right to keep his employment file private and away from public scrutiny."

Flesh disputed the procedure used to close the meeting. The Court reviewed the meeting minutes and said, "Clearly the presiding officer properly followed the procedure set for in [the Open Meeting Act]." Flesh disputed the further closure of the deliberations portion of the meeting, but the Court said that "the record implicitly shows the deliberations, like the grievance portion of the meeting, was closed to protect Dehne's privacy interest." Finally, the Court addressed Flesh's contention that closure of the meeting was a prior restraint on his right of free speech: "We find no merit in this argument."

*State v. Christensen (1990) — **criminal***

This decision answered the question implicitly posed in *State v. Long* (p. 15): Is evidence obtained through the felonious conduct of a private individual admissible? In a five – two decision, the Court ruled it is.

The Kalispell police had arrested three men for possession and sale of marijuana. Under questioning, the suspects said they had stolen the pot from the Kalispell home of the defendant here, William Christensen. They also said Christensen was growing marijuana at his East Glacier home. Relying on that information, officials obtained search warrants for both houses and, based on the resulting searches, arrested Christensen. He moved to suppress the evidence because it resulted from the felonious conduct of private individuals. District Court granted the motion, and the State appealed.

In accordance with the *Long* decision, the State and Christensen agreed that no violation of his right of privacy occurred, since the burglary took place "without the encouragement, knowledge, or consent of the police." The principal issue, then, was "whether private felonious conduct is subject to the exclusionary rule even though that conduct [did] not entail a constitutional violation." The Court acknowledged that, in *Long*, "we expressed a concern based on ... the imperative of judicial integrity that some private searches might warrant use of the exclusionary rule." Christensen asserted that use of the evidence here would "tarnish the prestige of the courts and encourage neo-vigilantism." In the words of the Court, "[Christensen's] arguments awaken the image of spectral horsemen riding forth from Virginia City to enforce law and order ..., but leaving in their dust the trampled remnants of the constitution."

The Court disagreed: "The prospect of serving time along with their victims should be enough to discourage private citizens from conducting felonious searches. More importantly, the burglars in this case had no intention of serving up illegal evidence to state prosecutors ..." On the other hand, "failure to admit highly probative evidence ... produced by legitimate law enforcement practices would undermine public confidence in the judicial system." Furthermore, said the Court, "Even if the burglars had taken the marijuana with the intention of turning it over to state prosecutors, the exclusionary rule would still not apply ... The universal rule under both state and federal constitutions is that the exclusionary rule does not apply to evidence resulting from the actions of private individuals unless those individuals are acting as agents of the state."

"For these reasons," held the Court, "we believe that Montana should join all other jurisdictions in re-

fusing to apply the exclusionary rule to evidence resulting from private action. We, therefore, hold that the exclusionary rule does not apply to evidence resulting from the conduct of private individuals, even if felonious, unless that conduct involves state action." Thus, the Court reversed the suppression order.

Justice Hunt wrote the dissent, joined by Justice Sheehy. "Judicial integrity," said Hunt, "necessitates that the exclusionary rule extend to the activities of private citizens who, in obtaining evidence, violate the criminal laws." Reaffirming his dissent in *Long*, Hunt wrote, "Crooks as well as trespassers and snoops should be outlawed from doing the work of ... law enforcement officers." In conclusion, he asked, "If private citizens are allowed to knowingly break the laws, and the government reaps the benefits from such activity, does not the government essentially become the perpetrator? If the government is allowed to use evidence that was illegally seized, does not the government become like the recipient of stolen goods?" "In this case," said Hunt, "the government receive stolen property knowing it was stolen. It should be forced to obey the very laws that it is to uphold."

The Associated Press, et al. v. the Board of Public Education (1991) — meetings

With this far-reaching decision, the Court unanimously ruled on a provision of the Open Meeting Act. The issue was similar to that framed in *Rickey v. City of Dillon* (p. 13) in 1983. Specifically, the disputed provision stated, "a meeting may be closed to discuss a strategy to be followed with respect to ... litigation when an open meeting would have a detrimental effect on the ... litigating position of the public agency." (2-3-203(4), MCA)

The controversy began February 8, 1989, when the Board of Public Education convened to discuss an Executive Order from the Governor's Office. The order required state agencies to submit any proposed administrative rules to the Governor's Office for review and approval. The Board was considering a legal challenge to the order. At the beginning of the meeting, six people were physically present: the Board chairman, its executive assistant, her administrative assistant, an attorney, an Associated Press reporter, and a representative of the Governor's Office. Six other Board members participated by speaker phone.

Immediately after convening, the Board voted to close the meeting to discuss the potential litigation against the Governor. The reporter, administrative assistant, and governor's representative were excluded from the meeting; the reporter protested her exclusion. After a half-hour, the Board reopened the meeting, and the three excluded persons were allowed back in. At that time, the Board voted to file suit against the Governor.

The next day, the Associated Press filed suit against the Board. The AP was joined by 13 other media organizations: the Billings *Gazette*, the Helena *Independent Record*, the *Missoulian* , the Great Falls *Tribune*, the Kalispell *Daily Interlake*, the Bozeman *Daily Chronicle*, the Havre *Daily News*, the Livingston *Enterprise*, the Miles City *Star*, the *Montana Standard*, the *Ravalli Republic*, the Montana Newspaper Association, and the Montana Chapter of the Society of Professional Journalists. The plaintiffs argued that the Article II, Section 9 of the Montana Constitution provides only one reason for closing a meeting — the demand of individual privacy. They asked the District Court to declare the "litigation strategy" provision of the Open Meeting Act unconstitutional. District Court granted summary judgement to the plaintiffs and declared the section unconstitutional. The Board appealed.

The Board argued that other rights had to be balanced against the public's right to know. It maintained that the public has a right to due process which exceeds the right to know. And inherent in the right of due process is the right to confidential communication with counsel. The Court debunked this line of reasoning: "State agencies have never been included under the umbrella of due process. The protections guaranteed by the constitutional right to due process were designed to protect people from governmental abuses. They were not designed to protect the government from the people."

Another argument by the Board focused on the constitutional authority of the Supreme Court to make rules governing attorneys. Rule 1.6 of the Rules of Professional Conduct require attorneys to keep client information confidential. Therefore, the rule prevents attorneys from discussing legal matters of their client agencies in open meetings. The Court responded that "the Constitution is the supreme law of this state." No rules may violate the constitution, so "[t]he interpretation of such rules is limited by the confines of the Constitution." Secondly, attorneys are also directed to act within the law, and the law requires open meetings.

The Board also argued that "public policy considerations" mandated closure of meetings to discuss litigation. Unless state agencies could discuss a litigation position confidentially, they would be at a severe disadvantage. "However," said the Court, "this argument really doesn't apply to the facts of this case." With regard to the nature of the legal dispute between the Board and the Governor, the Court termed it "essentially a turf battle which should be given public scrutiny in all its particulars. In short, it

is the public's business."

"Applying the language of the [right to know] provision to the agreed facts of this case," said the Court, "we conclude that the Board wrongfully closed its meeting ..." One must note that the Court framed the issue narrowly: whether an agency can close a meeting "to discuss litigation strategy to be used in potential litigation against *another state governmental entity.*" (emphasis added) It didn't address the circumstance of litigation between an agency and a private party. In addition, while District Court declared the litigation exception in the Open Meeting Act unconstitutional (and the Supreme Court affirmed its decision), the higher court, in its decision, never ruled explicitly on the constitutionality of the law.

Opinions of the Attorney General

*35 AGO 19 (1973) — **records***

HELD: 1. The Montana statute providing for confidential applications under the Hard Rock Mining Act is constitutional under Article II, Section 9 ...

2. Confidential information contained in an application to the department for a hard rock mining permit cannot be made public through an environmental impact statement.

This opinion provided the first occasion for the Attorney General to look at the requirements of "the new Montana Constitution" and how they affect a state agency. The Department of State Lands wanted to know how the right to know provision would affect the statute in the Hard Rock Mining Act requiring information in applications to be kept confidential. It also asked whether such information could be made public through the environmental impact statements required by the Environmental Policy Act.

The AG, Robert Woodahl, first noted that "section 9 was not intended to open all documents to public scrutiny. The drafters recognized the right of the legislature to promulgate provisions ... respecting individual privacy." In this case, wrote Woodahl, "The confidentiality section of the Hard Rock Mining Act can be construed to fit within this exception." The AG did not consider the nature of the information in question. Rather, he based his opinion on the fact of the privacy exception in the right to know, the "legislative determination of meritorious privacy" by statute, and the duty to construe statutes "in favor of constitutionality."

The AG also addressed the meaning of the word "individual": "Case law provides that individual may be construed to be used in the sense of person, but also embraces artificial or corporate persons as well as natural." The AG thus concluded that "the word 'individual' in section 9 refers to corporate privacy as well as a natural person's privacy. To hold otherwise would open the door to many statutorily protected confidential areas," such as bank reports, corporate tax returns, and bidding on state contracts.

On the second question, the AG conceded that the Environmental Policy Act "provides that impact statements be made available to the public and such statements will of necessity contain material obtained from an application for an operating permit." However, the Hard Rock Mining Act section requires confidentiality, so the "information submitted in applications ... may not be used for the preparation of impact statements."

*35 AGO 27 (1973) — **records***

HELD: The board of nurses must issue lists of registered nurses and licensed practical nurses to members of the public who wish to purchase them.

In this brief response to a question from the Board of Nurses, the Attorney General had to look no further than the statute that created the Board. It provides, "The records and files of the board shall be at all times open to public inspection." Said the AG, "The intent of the legislature in this section is clear and unambiguous." Furthermore, the Public Records Act requires agencies to supply, on demand, copies of documents.

*35 AGO 59 (1973) — **records***

HELD: The Constitution of Montana, Article II, section 9, does not require the department of revenue to release information to the public regarding supplemental bank assessments that were issued against Montana banks as a result of an examination of such banks ...

The Department of Revenue submitted the question considered here. The Attorney General noted that an

examination under the statute in question constituted "a criminal investigation into the possibility of tax fraud." Given this fact, he stated, "The right of inspection does not extend to all public records or documents. Public policy and due process demand that investigative reports of possible criminal activity remain confidential to protect the innocent as well as the guilty, and to encourage cooperation with state agencies for full disclosure which, in turn, should help to promote confidence and credibility in state government."

The AG noted that other statutes protect the confidentiality of bank records and examinations. However, the statute in question has no confidentiality requirement. "In the absence of a specific confidentiality statute," said the AG, "the director of the department of revenue is the appropriate government official to determine whether or not public disclosure is in the best interest of the state by weighing the demand for individual privacy against the merits of public disclosure. This is his prerogative, subject only to review by the courts."

35 AGO 62 (1974) — records

HELD: The publication by county officers of a list of delinquent taxpayers in a newspaper for purposes of embarrassment would be an excessive exercise of their statutory powers and an invasion of privacy in violation of Article II, section 10 ...

The Attorney General issued this opinion in response to a request from the Flathead County Attorney. The AG cited the two statutory instances in which the county may publish names of individual delinquent taxpayers: (1) when a public sale of the property for tax purposes is contemplated, and (2) the delinquent list kept on file in the office of the county treasurer and available to public inspection.

Noting that "[a] county must derive its powers by express, direct grant from the legislature," the AG said, "It is apparent that county officers would be acting in excess of their express legislative grant of power if they were to publish a list of delinquent taxpayers in a newspaper for the purpose of embarrassment." The AG did not discuss whether a privacy interest attached to the fact of delinquent taxes. He did note that Article II, section 10 protects privacy except in cases of compelling state interest. "The facts, as stated ..." he concluded, "do not suggest any such 'compelling state interest' is present to justify the publication ..."

35 AGO 84 (1974) — records

HELD: University motor vehicle records relating to vehicle registration, decals, permits, passes and traffic fines are public documents subject to public inspection.

In response to a request from the Commissioner of Higher Education, the Attorney General cited the Public Records Act and Article II, section 9 (right to know). Although the AG discussed a public official "weighing the demand for individual privacy against the merits of public disclosure" in 35 AGO 59 (p. 26), he took a different tack here: "Article II, section 9 ... basically sets forth a balancing test ... However, in the absence of any legislative direction or express promulgations by the university, records concerning motor vehicle registration are accessible to the public."

The AG concluded that disclosing these records "would not appear to be an invasion of individual privacy." He noted, though, "that while the vehicle records listing the names of persons may be open to the public, the public is limited ... in delving further into the private lives of the individuals." As an example, he noted that people with disabilities are entitled to special decals. While the list of persons entitled to such decals is public, "the medical information entitling those persons to that decal is not public information. Clearly, the demand of individual privacy exceeds the merits of public disclosure in such a case."

36 AGO 28 (1975) — records

HELD: The salaries of teachers and administrators of a public school district are subject to inspection by the public.

Here was another question that shone in the light of Article II, section 9. The Attorney General again said, "That provision clearly presents a balancing test approach to the dilemma." Solving such a dilemma often would require consideration of other relevant factors. "In the present case several factors exist which give additional weight to the public's right to know."

The AG cited the section of the Open Meeting Act that requires minutes to be available for inspection. He

also cited the general provision of the Public Records Act that records are open. And statutes governing school districts provide that all business be conducted in public meetings of the trustees, which would include setting salaries. In addition, another section of that part provides that a full record of trustee actions be made available to the public. Given all this, concluded the AG, there would be "no basis for holding an executive session in regard to teacher's or other employee's salaries." Under the Constitution and the statutes, "an overwhelming weight has been placed on the public's right to know in regard to actions taken by the trustees of local school districts."

37 AGO 107 (1978) — records

HELD: 1. The Board of Real Estate, when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and, if so, the reason for the disciplinary action. Public access to information relating to complaints or to allegations is left to the discretion of the board, within the guidelines of this opinion.

2. All minutes of the Board of Real Estate, except those minutes of a meeting closed by the presiding officer pursuant to [the Open Meeting Act], must be open to public inspection.

3. Public access to the other files on individual licensees is left to the discretion of the Board of Real Estate within the guidelines of this opinion.

This extensive opinion was the first to address a right to know issue under Attorney General Mike Greely. The opinion followed the line of reasoning begun by Woodahl and sought to address some issues previously ignored. Perhaps most significant was the formulation of the "balancing test" alluded to in earlier opinions. Greely wrote that "this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy *clearly outweighs* the demand of public disclosure."

With regard to who should perform this test, the AG noted that "Art. II, section 9 ... makes no reference to the responsibility for making this decision." Based on his reading of statutory law, though, he found the duty rested with the Board of Real Estate in this case, "subject to judicial review." The possibility of judicial review led the AG to lay out some procedural requirements: "In order to provide an accurate basis for possible litigation the board must require all requests for information to be in writing and be specific. In turn, any grants or denials of access given by the Board must be in writing and specifically state the reasons ..."

In this opinion, the AG also noted that "[t]he right of privacy is a developing one and not precisely defined." He understood the privacy exception to the right to know to be one termed "disclosural privacy": "an individual's ability to choose for himself the time and circumstances under which, and the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others." Using this definition, "[t]he board must recognize a demand of individual privacy, regardless of degree, when the information at issue reveals facts" in those areas. This was the first step of the balancing test.

Once the demand of privacy is recognized, the AG continued, "the degree of infringement ... must be determined." That will vary, he noted, according to the type of information sought. Correspondingly, the demand of disclosure will vary according to the degree of privacy involved. "In the merits of public disclosure, two interests are involved ... the government's need for information and the public's interest in access to government records."

These interests may conflict, for government "may have a reasonable concern that licensees and complainants may be hesitant to come forward with needed information should all records ... be open for public inspection." On the other hand, "the public has a valid interest in knowing what government is doing." Since, in this case, the Board licenses and regulates the real estate profession, "dissemination of information compiled by the board plays an important role in carrying out the board's function." As a side note, the AG found that neither the Constitution nor the statutes "suggest that an individual must display a certain reason in order to inspect government operations and records."

Applying the third step of the balancing test, the AG noted that "the general rule must be that government records are open to the public, with the burden on the custodian of the records to affirmatively show that the demands of individual privacy clearly outweigh the merits of public disclosure." Unless the legislature has statutorily protected specific records, "public disclosure is compelling," but not absolute. Here, "[t]he protection afforded the public ... by disclosing disciplinary action against any indi-

vidual licensees and the reason for such disciplinary action clearly outweighs any demand of individual privacy asserted by the guilty party."

That would not mean, however, throwing open the files. "The board should have the discretion to deny public access to those records containing complaints in the investigatory stages, allegations which are uncorroborated and unsupported, and the source of a complaint or information compiled during an investigation."

Access to other files on realtors was "left to the board's discretion. The balancing test ... should be applied with relation to each type of information sought." The AG outlined some alternatives. License applicants could be informed that information could be made public, and certain information deemed optional. If the applicant then supplied the information, he or she would have tacitly waived confidentiality. The board might also screen records requested for inspection and delete personal references if needed to protect privacy. "As a final note," wrote the AG, " a voluntary and intelligent waiver of the right of privacy on the part of any individual would negate the concern" for protecting that privacy.

37 AGO 112 (1978) — records

HELD: County Attorneys, laws enforcement personnel, and coroners must release reports of accident investigations, autopsies and related test to persons specifically listed in statues. Public access to the results of investigations not covered by statute is left to the discretion of the public official following the guidelines set forth in this opinion and 37 OP. ATT'Y GEN. NO. 107 (1978).

In response to a request from the Cascade County Attorney, the Attorney General addressed several types of information, some covered by statute, some not. (Much of the information later fell under the Criminal Justice Information Act, passed in 1979. See 42 AGO 119, p. 36.)

The AG made reference to the right to know and right of privacy provisions. "There are two fundamental rights necessarily in conflict. On the one hand, the right of privacy which an be infringed only upon a showing of a compelling state interest, and on the other a right of public disclosure which may be defeated only if the individual's right of privacy is paramount." Because of the conflicting rights, "it is apparent that each circumstance must be addressed individually." Under this specific request, said the AG, "Problems arise with regard to criminal investigations which may very well involve matters not covered by statute."

Following the conclusions of 37 AGO 107 (p. 28), the AG reiterated, "The public official who is the custodian of those records must apply the balancing test set forth in that opinion." Here, "the balancing test in a criminal investigation will vary according to the stage of that investigation. Rights of privacy of witnesses, informants, or accused parties weigh heavily in the early and unsubstantiated stages. On the other hand the right to know becomes paramount when a criminal matter has culminated in the filing of an information or complaint as a matter of public record. The area in between must necessarily be left to the discretion of the custodian of the information."

37 AGO 159 (1978) — records

HELD: ... 2. An applicant for a marriage license can be required to disclose information concerning his or her dependants race, education and support obligations.

The Attorney General combined and responded to separate requests from the County Attorneys of Flathead and Cascade. The second question asked whether marriage license applicants had to provide information about race, education, and default on support obligations.

The AG noted that the Department of Health and Environmental Sciences supplies a standard application form to counties. The form contains the objectionable questions. Under statutes, DHES is required to gather vital statistics and to prescribe the marriage license application form. "The question then becomes," said the AG, "is the requirement of disclosure of this information a violation of some constitutional right?"

Citing federal precedent, the AG said that such information "may serve a useful purpose and [its] procurement and compilation ... cannot be outlawed per se." "However," he continued, "the right of privacy ... does create a question as to the validity of requiring disclosure of such information. Undoubtedly, many matters required to be disclosed are personal in nature. The question is, are they over-come by a government interest?" The AG said they are, again citing federal precedent: "Requiring disclosure of personal information in order to provide accurate statistical reports is not an unconstitutional invasion of the right to privacy."

37 AGO 170 (1978) — meetings

HELD: A public body may close a meeting under [the Open Meeting Law] when the matter discussed relates to privacy and the demand for individual privacy clearly exceeds the merits of public disclosure.

That rather self-evident holding stemmed from a request by the Yellowstone County Attorney. He asked whether the collective bargaining exception in the Open Meeting Act could be invoked when the discussion related to wages, but not the wages of a collective bargaining unit. The Attorney General did not discuss the distinction between union and non-union negotiations; rather, he questioned the constitutionality of the collective bargaining exception altogether.

The County Attorney had related a situation in which the city council had closed part of a regular meeting to discuss the wages of non-union supervisors in the police department. He indicated that the discussion also involved personal and private matters of the supervisors. The question was whether the collective bargaining exception could be applied to discussing the wages of these non-union personnel. (See *Jarussi v. Board of Trustees*, p. 12.)

The AG examined the right to know, the right of privacy, and the Open Meeting Act. Of the latter, he said, "The history of this statutory provision indicates that the Legislature has repeatedly broadened its coverage, even though it is not yet coextensive with the rights granted by Article II, section 9 ..." With regard to the question at hand, the AG said, "[I]t is apparent that the meeting ... involved matters of individual privacy. Therefore, ... the meeting was properly subject to closure to the extent that matters of individual privacy were discussed, and to the extent that the privacy aspect of those matters outweighed the merits of public disclosure."

The AG then noted that the Open Meeting Act allows closure of meetings to discuss strategy related to litigation or collective bargaining. "While it is beyond the scope of this opinion to question the constitutionality of [those exceptions], the patent conflict between the statute and the constitution is unavoidable. If such a conflict is found by a court to exist, the constitutional provision must prevail ..." The AG granted that if there was an overlap between strategy discussions and individual privacy, the meeting might be closed, depending on the balancing test on the issue of privacy. "It is clear, however, that the mere presence of discussions relating to collective bargaining or litigation strategy *without more* is insufficient to allow a meeting to be closed under Article II, section 9."

"This conflict," concluded the AG, "has caused a great deal of confusion ... The Legislature should remedy this situation by either amending the open-meeting statute ... or taking steps to amend Article II, section 9 to allow closure in instances other than matters of individual privacy. This choice between these alternatives is one for the Legislature or the people to make, but it must be made."

38 AGO 1 (1979) — records

HELD: Pesticice applicator and dealer records held by the Department of Agriculture are subject to public disclosure upon a finding by the Department that the public's right to know outweighs the individual applicator's or dealer's right to privacy. Non-disclosure of such records is appropriate only where the Department has determined that a matter of privacy is involved, has weighed the demands of that privacy and the merits of publicly disclosing the records, and has found that the demand of individual privacy clearly outweighs *the demand of public disclosure.*

This opinion answered a request by the Department of Agriculture; it had adopted an administrative rule requiring that individual pesticide applicator records would not be made public except under court direction. The department adopted the rule by its authority under the Montana Pesticides Act, passed in 1971. No rule limited the disclosure of pesticide dealer records.

The Attorney General undertook an examination of the Department's policy. "The Montana Supreme Court has not construed the ... right to know or privacy provisions to either allow or prohibit any particular disclosure policy," he said. Thus, he cited the balancing test of 37 AGO 107 (p. 28), saying "it ap-plies in general to other agencies as well." Looking at the statute, the AG concluded that "nothing in the Pesticides Act authorizes the Department to preclude public access to its applicator records and, unless the legislature expressly states that such confidentiality is to be maintained, it is doubtful that the Department can reasonably interpret its mandate to require confidentiality."

"Pesticide ... records involve essentially commercial information concerning materials which can have a profound effect on man and his environment. While public access to such information is within the Department's discretion, the Department must apply the balancing test ... rather than precluding access automatically." Thus, the rule would be void, as an unreasonable exercise of delegated power.

*38 AGO 8 (1979) — **meetings***

HELD: A member of the public is authorized to make a mechanical recording of the proceedings and deliberations of an open school board meeting.

An interpretation of the Open Meeting Act, this opinion followed a request by the Glacier County Attorney. The Attorney General found that the Open Meeting Act did not specifically address the question: "Section 2-3-211, MCA, provides that 'accredited press representatives' may not prohibited from recording the meetings. ... There is no specific reference in the law to recordings made by any other person."

However, the legislative intent in the Act mandates "liberal construction." The AG noted that many meetings may deal with lengthy and complex issues, or a person may be attempting to observe several different meetings. Thus, recording the meetings would be a "simple and efficient" method for members of the public to keep track of what is said and done in meetings. Therefore, the legislative intent "would be furthered by allowing interested members of the public to mechanically record open meetings."

*38 AGO 33 (1979) — **meetings***

HELD: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana Open Meeting Act. They must be open to the public unless the presiding oficerr determines that the discussion relates to a matter of individual privacy, and that the demands of individual privacy clearly exceed the merits of public disclosure.

The Human Rights Commission raised the question whether its deliberations could be exempted from the Open Meeting Act "because they are akin to the deliberations of a jury or an appellate court." The Attorney General pointed out that "the Act applies to all 'governmental bodies, boards, bureaus, *commissions,* or agencies of the state," so it would apply, at least on its face, to the Human Rights Commission.

Regarding whether the HRC deliberations, by their judicial nature, should be exempt, the AG said, "The issue has not been litigated ... in Montana. There is no general consensus among those jurisdictions in which the question has arisen." Given that finding, he concluded, "Unless the Legislature or the courts in Montana are inclined to adopt an exemption from the express provisions of our Open Meeting Act for quasi-judicial deliberations, I am unwilling to create that exemption here."

Of course, noted the AG, the HRC could still close its deliberations when "the individual's right to privacy clearly exceeds the public's right to know." In many HRC cases, the privacy exception could preserve the "judicial atmosphere." "In the case of other quasi-judicial bodies which consider questions of broader public impact, the expansive intent in our Constitution and statutes favoring public disclosure can be preserved. If this inhibits frank discussion of views and issues by board members, that is a price demanded by our Constitution and our Legislature ..."

*38 AGO 59 (1979) — **records***

HELD: 1. Under the provisions of [the Public Records Act], agencies are prohibited from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls.

2. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies or other associations.

3. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty of [the law] is sufficient.

This opinion sought to clarify for the Secretary of State the requirements of the prohibition on mailing lists (2-6-109, MCA). First off, the Attorney General noted the record-keeping, -distribution, and -access duties required by law of the Secretary of State. The AG opined that § 2-6-106 would "not necessarily conflict with the existing duties or practices of the Secretary of State."

In examining the mailing-list statute, the AG analyzed the meaning of the terms "mailing list" and "lists of persons." The former, he said, must be understood to mean a list "used for unsolicited mass mailings, house calls or distributions, and/or telephone calls." Thus, agencies are prohibited from distributing such list only if the recipient intends to to use it for those purposes. "Agencies are *not* precluded from distributing or selling such lists for other uses."

With regard to the term, "lists of persons," the AG held that "the reference to 'persons' is to natural persons." Under the Constitution, "[t]he right of privacy is by nature a personal one of individual human beings. ... It is my opinion that [the mailing-list law] does not forbid the dissemination of lists of names of corporations, associations, governmental bodies and businesses for use as mailing lists." (See 43 AGO 73, p. 38.)

Overall, the AG found that the issue involved minimal interests, either for the right of privacy or the right to know. The "mere appearance" of one's name and address on an agency list involves a very slight demand of individual privacy. On the other hand, access to a list for "commercial profit making purposes" is not a strong right-to-know interest. Given, however, that "the Legislature ... has declared that a matter of individual privacy is involved in the dissemination of agency lists for use as mailing lists," the AG held that the law "should be given a liberal interpretation." Thus, "[o]nly when an agency has been made aware that the information sought is to be used as a 'mailing list' would they be prohibited from providing it."

The AG conceded that this approach may result in people acquiring lists for ostensibly legitimate purposes and then using them as mailing lists. Such activity, though, would be a misdemeanor under the law, and all the agency need do is make people aware of that when they request a list. The agency could do so by attaching a letter or other written disclaimer to the list when giving it out.

38 AGO 65 (1980) — records

HELD: 1. Original voter registration forms are available for public inspection.

2. Precinct registers are available for public inspections following the canvass of election returns.

A request from the Cascade County Attorney prompted this opinion. The Attorney General cited a new law, passed by the 1979 Legislature, that provided "all records pertaining to elector registration and elections are public records." (13-1-109, MCA) However, original registration forms must, under statute, be assigned a number, which may be the voter's social security number. A related statute provides that, if the social security number is used, it may not be printed on other lists or released publically. "Therefore," said the AG, "an original signed registration form is available for public inspection unless the elector's social security number appears on it."

In reaching the second holding, the AG recited the legal requirements for the preparation, use, and treatment of precinct registers. Under the law, the registers must be sealed after the election until the county board of canvassers canvasses the returns. However, the law "does not specifically provide that those records are not to be opened to the public following the canvass," so they must be presumed open.

38 AGO 109 (1980) — records

HELD: 1. A state employee's title, dates and duration of employment, and salary are public information.

2. A state agency may require that requests for disclosure of a state employee's title, dates and duration of employment, and salary be in writing. However, the agency may not require that justification for the requests be given.

The Attorney General began this opinion, in response to a request from the Department of Administration, by reciting the usual litany regarding the right to know, the right of privacy, and the balancing test. However, he did formulate the strongest statement yet of responsibility: "It is the duty of each agency, when asked to disclose information, to apply these steps and make an independent determination within the guidelines of the law, subject to judicial review." He also stated that applying the balancing test should involve examining legal precedent. He did so, and came to these conclusions.

"With respect to a state employee's title, I find that no matter of individual privacy is even arguably involved." No personal matters were involved; a job title "is related purely to [the] public role as a public employee." Deciding on the issues of dates of employment and salary were "only slightly more difficult. I reach the same conclusion — no privacy right is infringed by the disclosure ..." While the information may involve a slight demand for individual privacy, it "does not outweigh the great merit of allowing the public to know who its employees are, what their jobs are, and how much they are being paid."

Should requests for such information be in writing? The AG cited 37 AGO 107 (p. 28), in which he had held the requests *must* be in writing. In that situation, though, "the demand of individual privacy was substantial." In this case, "the demand of individual privacy, if any, is slight." The AG concluded it

would not be necessary that requests be put in writing, but "the Constitution does not prohibit a requirement that requests be in writing." Thus, he left it up to the agency whether it would require written requests. "An agency may not, however, requre that justification for the request be given. Our Constitution ... is alone sufficient justification."

39 AGO 17 (1981) — records

HELD: The Department of Revenue may not withhold property record cards from public inspection.

Obviously, the request here came from the Department of Revenue. At issue were "working papers," the property record cards that tax appraisers take into the field. On the cards, appraisers note their observations and judgements about the property undergoing appraisal. The Attorney General examined decisions from several jurisdictions, and he found that "as a matter of law ... no demand of individual privacy is present, no balancing is required, and the public's right to know on what basis assessments are made is guaranteed." "Even if privacy were involved," he continued, "it would not be sufficient to outweigh the merits of public disclosure."

Following this holding, the AG refuted the legal arguments advanced by the Department to keep the cards confidential. The Department had contended that property record cards did not fall under the definition of "public writings" in the Public Records Act. The AG termed the issue "irrelevant," since the Constitution guarantees access to "documents," not "public writings." Furthermore, the Supreme Court had long ago held that the access requirements of the Public Records Act extend beyond public writings. (See *State ex rel. Holloran*, p. 2.)

The Department had argued further that the situation was one where people were trying to find out information the State had gathered on individuals. No matter, said the AG, in line with previous opinions: "In determining whether information should be available to the public, the subjective motives of those seeking access must be disregarded."

41 AGO 35 (1985) — records

HELD: The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public.

At issue here was "merit pay" awarded to the Bozeman School District administrators under a special program adopted by the school board. The merit pay was given over and above base salaries and directly tied to the results of performance evaluations. In examining the question, the Attorney General did not use the three-part balancing test previously cited in AG opinions (see 37 AGO 107, p. 28); rather, he referred to the two-part test enunciated by the Montana Supreme Court (see *Missoulian v. Board of Regents*, p. 13).

Here, "[b]ecause the amount [of merit pay] is directly affected by the outcome of a performance evaluation, the administrator may have an expectation that the amount of merit pay would not be disclosed." But would the expectation be reasonable? The AG cited the holding in *Missoulian* that performance evaluations involve strong privacy rights. "In the situation at hand," he countered, "the amount of merit pay would be disclosed, not the particulars of the evaluation." Since "the merit pay is essentially money paid by the public," the AG held, "It would be unreasonable for the administrators to expect that the amount of merit pay, derived from public moneys, would be more private than their base salaries." Thus, no right of privacy attaches to the amount of merit pay, and it would be unnecessary to determine if the right of privacy exceeded the public's right to know.

41 AGO 38 (1985) — meetings

HELD: A regularly scheduled meeting between the board of county commissioners and its staff is a meeting within the terms of the open meetings law.

The Yellowstone County Attorney had revealed that the board of commissioners and its staff met at a particular time each week. The public was excluded from the meetings. The attorney wanted to know whether the meetings fell under the Open Meeting Act. Yes, said the Attorney General.

The AG first cited the constitutional right-to-know provision. "The plain meaning of this section is that the public has a very broad right to observe the proceedings which occur in government agencies." He then cited the definition of meeting under the Open Meeting Act: "'meeting' means the convening of a quo-

rum of the constitutent membership of a public agency ... to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." (2-3-202, MCA) "It is clear from this definition," said the AG, "that meetings are not limited to official, final action on a proposal." Given the limitation that a quorum be present to make a meeting, "it would require the presence of at least two commissioners" to make the staff meeting subject to the Open Meeting Act.

Once the meeting falls under the Act, it must be noticed. The AG noted this requirement "need not be ... onerous ..., particularly when dealing with a regularly scheduled meeting." The law requires county commissions to establish regular meeting dates by resolution. Once this were done, "[p]ublication of this resolution then serves as continuing notice. Special notice would only be required for a meeting not held at the regular date." In addition, a staff meeting could be closed where the demand for individual privacy clearly exceeded the merits of public disclosure.

*41 AGO 92 (1986) — **records***

HELD: 1. The [Crime Victims Compensation Act] authorizes the Workers' Compensation Division to obtain confidential criminal justice information.

2. The confidentiality of such information must be maintained when received by the Division.

In response to a pair of questions from the Phillips County Attorney, the Attorney General examined the Crime Victims Compensation Act, the Criminal Justice Information Act, and the Workers' Compensation Act. Under the first act, the Workers' Compensation Division determined eligibility for and amount of compensation. The act authorizes the Division to "request and obtain from prosecuting attorneys and law enforcement officers investigations and data ..."

The AG found this "clear and unambiguous": "The Division is entitled to obtain from law enforcement agencies *any* information — including investigative information — it deems relevant to determine a claimant's eligibility and amount of award." Under the Criminal Justice Information Act, investigative information is confidential and may be disseminated only to those authorized by law. Well, said the AG, "the Division may obtain such confidential information, because [the Crime Victims' Compensation Act] authorizes it to do so.

The second issue addressed the Division's responsibility once it had received the information. A section of the Workers' Compensation Act requires the Division to keep certain records confidential: "information of a personal nature such as personal, medical, or similar information if the public disclosure thereof would constitute an unreasonable invasion of privacy ..." Although the section does not specifically protect criminal justice information, the AG opined "that this statute must be read together with the Criminal Justice Information Act and pertinent provisions of the Montana Constitution. When so harmonized, the result compels continued confidentiality of the information." Given the history and intent of the statutes under scrutiny, the AG concluded, "It is clear that confidential criminal justice information received by the Division is intended to remain confidential."

*42 AGO 42 (1987) — **meetings***

HELD: The Daly Mansion Preservation Trust is a public body within the meaning of the open meeting law as it is performing a public function and is receiving funds generated by public property.

On December 31, 1986, the Montana Historical Society received deed to the Marcus Daly mansion and grounds near Hamilton. At that time, the Society contracted with the Valley Community Arts Council of Hamilton and the Daly Mansion Preservation Trust to operate and restore the property. The Trust was organized as a private, nonprofit corporation. The question arose whether the Trust, as a private entity, had to open its meetings; the Ravalli County Attorney referred the issue to the Attorney General.

The AG noted that the "corporation involved here was not created by or as a government body." However, he examined the nature of the Trust and its duties. Most significantly, he found that in performing duties under its contract, "the Trust is allowed to keep moneys generated by the promotion, viewing, and enjoyment of state property. This interplay of private and public functions leads me to the conclusion that the Trust is acting as a public body within the intendment of Article II, section 9 ..." and the Open Meeting Act. "Although this issue has not arisen in Montana," the AG noted, "courts in other states have determined the applicability of open meeting laws based on such factors as the funding, membership, and public or nonpublic nature of an association's functions and activities."

*42 AGO 51 (1988) — **meetings***

HELD: Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

The question here arose with regard to negotiating sessions between the state and the tribes with regard to regulation of hunting and fishing on the reservation. The state was represented at the sessions by the Director of Fish, Wildlife, and Parks, who was sometimes accompanied by a regional supervisor and department attorney. The Lake County Attorney asked whether these "discussions" fell under the Open Meeting Act.

The Attorney General based his opinion of the statutory definition of "meeting":

> ... meeting means the convening of a quorum of the constituent membership of a public agency or association ... to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. (2-3-202, MCA)

The AG noted that the FWP Director had the statutory authority to enter into an agreement with the tribes. The presence of other department representatives "could have no legal effect on securing the state-tribal agreement, since the authority lies in the director alone." Thus, he concluded that "the department head ... can hardly be viewed as the 'constituent membership' of his agency when carrying out statutory responsibilities vested in him alone."

Looking further into this line of reasoning, the AG said, "The term 'quorum' is typically used in the context of a deliberative body consisting of memberrs who act collectively. Use of 'deliberations' and 'discussions' in the context of open meeting laws connotes *collective* discussion and *collective* acquisition of information among the 'constituent membership' of the agency. Indeed, to hold that an agency director alone is a 'quorum of the constituent membership' of such agency effectively means that he would be deemed meeting with himself — a conclusion directly at odds with common sense."

Thus, the AG held that the negotiating sessions "do not fall within the scope" of the Open Meeting Act. He did not address the wider question of how Article II, section 9 would apply. The right to know provision refers to "deliberations of all public bodies"; neither "deliberations" nor "public bodies" are defined in the Open Meeting Act or elsewhere. The AG concluded his opinion by stating that FWP may need to follow the Public Participation Act with regard to any tentative agreement resulting from the state-tribal negotiations.

*42 AGO 61 (1988) — **meetings***

HELD: 1. The deliberations of a county tax appeal board regarding an application for reduction in property valuation must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure.

2. Adequate notice must be given of any meeting of a county tax appeal board, including the board's deliberations which involved the convening of a quorum to hear, discuss, or act upon an appeal.

This issue focused on two functions of a county tax appeal board: (1) it hears sworn testimony from a taxpayers who applyies for a reduced property valuation, and (2) it deliberates before reaching a decision on the application. The Gallatin County Attorney wanted to know if those deliberations could be closed to the public. The Attorney General first established that tax appeal boards are "state-funded boards assigned the governmental task of receiving input from the public and, thereafter, fixing property tax assessments." As such, they are subject to the Open Meeting Act.

"The fact that a county tax appeal board has finished hearing testimony ..." continued the AG, "does not mean that its meeting has necessarily ended." He concluded that "where a board's deliberations involve the convening of a quorum to hear, discuss, or act upon an appeal, there is a 'meeting' ... and the public must be allowed." The AG noted that tax appeal boards might be called "quasi-judicial" and referred to 38 AGO 33 (p. 31) that held quasi-judicial hearings must be open. However, the tax appeal boards could close a meeting on the demands of privacy. He noted, though, that "even if a meeting is closed to the general public, the taxpayer who is appealing has the right to attend." (See *Jarussi*, p. 12.)

The second question addressed in the opinion concerned the notice requirements of board meetings. The AG

cited the statute (15-15-103, MCA) that provides for specific notice requirements for a tax appeal board to "hear protests." "Such notice requirements may also apply when the board meets to discuss and deliberate about such protests and any applications" for revaluation, said the AG. The Open Meeting Act also requires adequate notice of meetings, he noted, so tax appeal boards must comply.

42 AGO 64 (1988) — records

HELD: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list.

Noting that the "mailing list law" (2-6-109, MCA) allows inspection of original documents to compile a mailing list, the Department of Administration wanted to know whether it had to allow such inspection of the original PERS applications submitted by eligible public employees. Here, the Attorney General analyzed the question using the Supreme Court's balancing test and the test first established in 37 AGO 107 (p. 28).

The PERS applications require employees to provide information about their beneficiaries. Based on this, the AG concluded "that applicants ... have an expectation that the information provided about beneficiaries ... will remain private. Does society consider this expectation reasonable? I believe it does." He based this belief on the fact that PERS is an insurance plan, and state and federal public policy "restricts the use of information gathered for insurance transactions."

The AG then compared the demands of privacy and merits of disclosure. "Because information about beneficiaries involves the 'disclosural privacy' of third persons, I believe a significant demand of individual privacy is involved. On the other hand, because the compilation of a mailing list is involved, I do not believe that the merits of public disclosure are substantial." In this case, then, privacy would outweigh disclosure, and the Department need not allow access to the documents.

42 AGO 119 (1988) — records

HELD: 1. Under section 44-5-301, MCA [Criminal Justice Information Act], the "original documents" available to the public are those documents originated by a criminal justice agency which fall within the definition of public criminal justice information as defined in section 44-5-103(12), MCA, including initial offense reports, initial arrest records, bail records, and daily jail occupancy records.

2. Under section 44-5-103(12), MCA, an initial offense report is the first record of a criminal justice agency which indicates that a criminal offense may have been committed, including the initial facts associated with that offense; an "initial arrest record" is the first record made by a criminal justice agency indicating the fact of a particular person's arrest. If an initial offense report or initial arrest record contains information defined as confidential by the Act, that information may have to be deleted prior to public dissemination.

3. The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determing whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated.

4. Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition given in section 44-5-103(12), MCA, except that if those recordings contain information defined as confidential by the Act, deletion of that information may be required prior to public dissemination.

5. A person not otherwise statutorily authorized is authorized by law to obtain confidential criminal justice information pursuant to section 44-5-303, MCA, when that person has obtained a district court order or subpoena requiring such disclosure.

6. Persons other than one charged with an offense are not entitled to receive confidential criminal investigation reports without either specific statutory authority or a district court order or subpoena requiring dissemination.

7. Under section 44-5-301 (1)(b), MCA, if a person's conviction record (1) reflects only misdemeanors and deferred prosecutions, and *(2) that conviction record reflects no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses,*

then no record or index information of any kind, including traffic offense records, may be public-ly disseminated. However, the Act specifically provides that records of traffic offenses maintained by the Department of Justice are not considered crminal history record information, and those records are publicly available by operation of section 61-6-107, MCA.

This lengthy opinion, in response to a request by the Billings City Attorney, clarifies several areas under the Criminal Justice Information Act of 1979. The extensive holdings should speak for themselves. Individual interested readers are encouraged to obtain a copy of the opinion for further information.

43 AGO 6 (1989) — records

HELD: Payroll record information, including the names, addresses, and wages of private employees working on a publicly funded project, that is reported to the Department of Highways is subject to public disclosure. The social security numbers of those employees are not subject to public disclosure.

This opinion marked the debut of Attorney General Marc Racicot on a right to know issue. In responding to a request from the Department of Highways, he laid out several facts: (1) the Department receives federal funds for highway construction; (2) the federal Davis-Bacon Act requires that private contractors working on highways pay the prevailing rate of wages to their employees; (3) to monitor compliance, contractors are required to submit weekly payroll records to the Department; (4) to verify compliance, a trade union had requested copies of some of the records; (5) the Department had "resisted" releasing the names, addresses, and social security numbers of the private employees.

Racicot stuck with the balancing test developed by Woodahl and Greely. Further, he cited 38 AGO 109 (p. 32), regarding a state employee's title, duration of employment, and salary. Although that opinion concerned public, not private, employees, he found the discussion relevant. His conclusion was "that the names, addresses, and wages of employees are not intimate details of a highly personal nature." Therefore, "while they involve a privacy interest, it is a minimal one. In comparison, the public has a substantial interest in verifying that employees receiving federal funds are complying with labor laws." On the balance, then, the merits of disclosing names, addresses, and wages outweighed the privacy interest.

"The social security numbers of the employees are a different matter," continued the AG. He cited a federal court decision recognizing "the strong privacy interest that employees have in their social security numbers. Against this strong privacy interest, I find no public interest that would be furthered by release of the social security numbers." Therefore, he said, release the names, addresses, and wages, but not the social security numbers.

43 AGO 25 (1989) — records

HELD: The "Buyer's Affidavit and Certification" submitted to the Board of Housing pursuant to the Mortgage Credit Certification Program is subject to public disclosure.

The Board of Housing submitted this request, as "certain federal agencies" had asked for copies of the documents in question. The Mortgage Credit Certification Program enables qualified mortgagors to credit a portion of their mortgage interest against federal income taxes. To determine qualification, applicants submit the Buyer's Affadavit and Certification, which includes substantial information about the applicants' personal finances. The feds were concerned that some people were not complying with the program requirements, and thus requested access to the affidavits.

The Attorney General acknowledged that "no express statutory provisions ... make any information obtained by the Board confidential or otherwise immune from public access." Thus, the balancing test had to be used. In doing so, the AG found that a privacy interest exists: "a statement of the borrower's annual household income is a matter of individual privacy." In addition, the applicants would reasonably have "an expectation that the information will be used by the [Board] ..., but that it will not be disclosed to the public."

Of interest, though, is the AG's conclusion that the "privacy interest is necessarily diminished when the individual submits the information to the Board ..." His reasoning was that "the information is integrated into a governmental function that directly benefits the borrower, and his objective expectation of privacy is thereby reduced." (The AG cited no authority to support this "reduced" expectation of privacy.) "In comparison," he continued, "the public has a substantial interest in verifying continued compliance of ... participants, since the program involves the public treasury." This conclusion, along with "the general rule ... that government records must be open to the public," resulted in the holding that the affadavits should be released.

43 AGO 73 (1990) — records

HELD: The prohibition of section 2-6-109, MCA, against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 38 Op. Att'y Gen. No. 59 at 207 (1979) is overruled insofar as it conflicts with the holding of this opinion.

The Secretary of State asked for this opinion after receiving a request for a list of all nonprofit corporations in good standing on file in his office. The individual making the request had said he intended to use the information as a mailing list. The pivotal question involved the holding in 38 AGO 59 (p. 31) that said, "The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies or other associations."

The Attorney General noted, "Since that opinion was issued, the Montana Supreme Court has twice held that the right of privacy exception to the right to know ... applies to corporations as well as individuals." (See *Mountain States Telephone & Telegraph*, p. 8, and *Belth v. Bennett*, p. 17.) After examining those cases, the AG concluded, "It is my opinion that the holdings in these cases are fully applicable to the issue raised here." Thus, he held that the prohibition against distributing mailing lists "applies with equal force to lists of both individual persons and corporations."

The AG added two "caveats" to this holding. He interpreted the *Belth* case to mean "that a decision to withhold mailing lists pursuant to the statute must be based on a determination that 'the demand of individual privacy clearly exceeds the merits of public disclosure.'" Under this interpretation, "[i]f the Secretary of State determines that there is no privacy interest at stake, or that the protected privacy interest does not clearly exceed the public's right to know, the prohibition of the statute does not apply, and the mailing lists at issue may be publicly disseminated." Secondly, the AG noted that the requesting individual is nonetheless allowed to compile a mailing list by examining original documents otherwise open to inspection.

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